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(Reports)
(The Supreme Court.)

II] JULY [1968

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.

M. A. Jabbar .. *Appellant**

v.

Commissioner of Income-Tax, Andhra Pradesh .. *Respondent.*

Income-tax Act (XI of 1922)—Capital or revenue expenditure—Business of supplying lime and sand—Short term lease for removal of sand from specified areas of river-bed —Payment of lease money—Nature of expenditure.

The assessee, an individual carrying on the business of supplying lime and sand, obtained a lease from the then Government of State of Hyderabad for a period of eleven months under which he was granted exclusive lease and liberty to enter, occupy, and use for quarrying purpose and to raise, render marketable, carry away, sell and dispose of sand within or under or upon the lands specified in the lease. There was also a provision that, in case any mineral not specified in the lease was discovered in the land, the lessee was to report such discovery to the Director of Mines and Geology and could obtain either a prospecting licence or a mining lease in respect of it, but, if he intimated his intention of not working the newly discovered mineral, or failed to give any intimation to work it within the period of three months, it would be open to the Government to sublet the working of such newly discovered mineral. Under this lease, the assessee was required to pay a sum of Rs. 82,500 as lease money to the Government. The assessee paid the lease money in two sums of Rs. 56,100 and Rs. 26,400 respectively, in the account years relevant to the assessment years 1955-56 and 1956-57 and claimed these two amounts as revenue expenditure. The Income-tax Officer disallowed the claim on the ground that the assessee had secured a right to quarry sand from the river-bed which was a right in the nature of a capital asset and therefore the payments made to secure that right were capital expenditure. The Appellate Assistant Commissioner, on appeal, held that what the assessee had secured under the lease was only stock-in-trade of his business and not a capital asset and therefore the payments made by the assessee were deductible as revenue expenditure. The Appellate Assistant Commissioner also recorded a finding of fact that all the sand that could be removed was lying on the surface of the river-beds and no opera-

* C. As. Nos. 2514 and 2515 of 1966. 23rd November, 1967.

tions were to be performed on the land before obtaining it. The Tribunal, on further appeal, upheld the order of the Appellate Assistant Commissioner. The High Court, on reference, answered the question in favour of the Department. On appeal to Supreme Court.

Held, that the expenditure incurred by the assessee in obtaining the lease was revenue expenditure for the purpose of obtaining stock-in-trade and not capital expenditure.

Though the terms of the lease indicate that an interest in land was also conveyed by the lease, that is not decisive of the question whether the money payable under the lease was a capital expenditure or a revenue expenditure. The decisive factor is the object with which the lease is taken and the nature of the payment which is being made when obtaining the lease. The expenditure incurred by the assessee was not related to the acquisition of an asset or a right of a permanent character. It was for the specific object of enabling the assessee to remove sand lying loose on the surface which was the stock-in-trade of the business of the assessee, so that the expenditure has to be regarded as revenue expenditure.

Held on facts: in agreeing to pay the large sum of Rs. 82,500 the assessee was bargaining for the right to remove the sand lying loose on the land within that short period of eleven months to the extent to which he could do so. He did not acquire any fixed or capital asset of an enduring nature by obtaining the lease and all he had in view was to have the right to obtain his stock-in-trade in the form of sand.

Appeals from the Judgment and Order dated the 4th March, 1965 of the Andhra Pradesh High Court in R. C. No. 15 of 1963*.

T. V. Anjaneyulu and *Anwarullah Pasha*, Advocates and *J. B. Dadachanji* and *O. C. Mathur*, Advocates of *M/s. J. B Dadachanji & Co.*, for Appellant.

S. T. Desai, Senior Advocate (*R. N. Sachthey* and *S. P. Nayar*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Bhargava, J.—The appellant-assessee, who is an individual, carries on business of supplying lime and sand With the object of procuring sand, he obtained a lease under a lease-deed dated 1st February, 1954, from the then Government of State of Hyderabad. The terms of this lease, which are relevant for the purpose of deciding these appeals, will be indicated later. At this stage, it may be mentioned that, under this lease, the assessee was required to pay a sum of Rs. 82,500 as lease money to the Government. The period of lease was from 1st February, 1954 to 31st December, 1954 The assessee's account year ends with the last day of September each year. The assessee paid a sum of Rs. 56,100 in respect of the account year ended 30th September, 1954 for the assessment year 1955-56, and another sum of Rs. 26,400 for the account year ended 30th September, 1955 relevant to the assessment year 1956-57. Both these payments were claimed by the assessee, in the proceedings for assessment to income-tax, as revenue expenditure. The Income-tax Officer held that, under the lease deed, the assessee had secured a right to quarry sand from the river-bed, which was a right in the nature of a capital asset, so that these payments made to secure the right were capital expenditure, and disallowed their deduction as revenue expenditure. The assessee appealed to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner, in addition to the material provided by the terms of the lease-deed and other material before him, made a personal investigation also. Thereafter, in his appellate order, he recorded findings that the lease was a short-term contract for one year, that the contract was for removal of sand lying on the surface of the river-beds, within a specified period and no excavation or skilful extraction was involved in the process, and that no

* (1966) 1 I.T J. 110 : (1966) 1 An. W.R. 106.

interest in the land was conveyed to the lessee, and, if the lessee discovered any minerals not specified in the deed, he was required to report that fact to the Director of Mines and obtain a prospecting licence separately. On these facts, he held that what the assessee had secured under the lease-deed was only stock-in-trade of his business and not a capital asset, so that his claim that the payments made by him under the lease-deed to the Government were deductable as revenue expenditure was allowed. Thereupon, an appeal was brought before the Income-tax Appellate Tribunal by the Department The Tribunal upheld the order of the Appellate Assistant Commissioner At the instance of the Department, the Tribunal then referred the following question for opinion to the High Court :—

"Whether, on the facts and in the circumstances of the case, the payments of Rs 56,100 for the assessment year 1955-56 and Rs 26,400 for the assessment year 1956-57 made under the lease deed dated 1st February, 1954 were expenditure of revenue nature ?"

The High Court answered the question in the negative, accepting the case of the Department, and thus upsetting the decision given by the Appellate Assistant Commissioner and the Tribunal. The assessee has now come up to this Court in appeal by certificate granted by the High Court.

Learned Counsel appearing for the assessee first contended before us that an examination of the terms of the lease-deed would show that no right at all in the land was acquired by the assessee under the lease, and that the only right which had been acquired was the right to remove sand lying on the land constituting the beds of the river and the nallahs specified in the deed and the ancillary right to enter the land for that purpose. It appears to us that, on the language of the lease-deed, this submission cannot be accepted. The lease specifically mentions in para. 3 that, under it, the Government do hereby demise and grant unto the lessee exclusive lease and liberty to enter, occupy, and use for quarrying purpose and to raise, render marketable, carry away, sell and dispose of sand within or under or upon the lands specified in this lease and for the period named therein. Thus, there was a specific provision that the lessee was to have an exclusive right to enter and occupy the land. Further, was a provision that, in case any mineral not specified in the lease was discovered in this land, the lessee was to report such discovery to the Director of Mines and Geology and could obtain either a prospecting licence or a mining lease in respect of it, but, if he intimated his intention of not working the newly discovered mineral, or failed to give any intimation to work it within the period of three months, it would be open to the Government to sublet the working of such newly discovered mineral. This use of the word "sublet" in the deed indicates, that, though the Government reserved to it the right to allow some other person to work the newly discovered mineral, that person could only be admitted as a sub-lessee and, obviously, he would be the sub-lessee under the assessee. These terms do indicate that an interest in land was also conveyed by the lease; but that is, in our opinion, not decisive of the question whether the money payable under the lease was a capital expenditure or a revenue expenditure. As an example, if a shop is taken on rent by a person to run his business and he pays monthly or annual rent, he certainly acquires an interest in the building and the land on which it stands as a lessee, but no one will contend that the payment of rent would be an expenditure of a capital nature and not revenue expenditure The decisive factor is the object with which the lease is taken and the nature of the payment which is being made when obtaining the lease.

In the present case, there are a number of factors which lead to the conclusion that the expenditure incurred by the assessee in obtaining the lease was revenue expenditure for the purpose of obtaining stock-in-trade and not capital expenditure. The first point is that the lease was for a very short period of 11 months only. Consequently, it is clear that the assessee did not obtain any capital asset of an enduring nature by obtaining this lease. Then the second circumstance is that the sole right which was acquired by him under the lease-deed was to take away the sand lying on the leased land. No doubt, the document mentioned that he was entitled to raise, render marketable, carry away, sell and dispose of the sand within or under

or upon the land specified in this lease ; but there was a clear finding of fact recorded by the Appellate Assistant Commissioner and affirmed by the Tribunal that all the sand that could be removed was lying on the surface and there was no question of raising, digging or excavating for the sand before obtaining it. No operations were, therefore, to be performed on the land itself. It appears that the High Court, in giving its decision against the assessee, fell into an error in not accepting the finding of fact that the sand was lying loose on the surface and the contract was only for removal of that sand and, instead, recording for itself a different finding In its appellate order, the Tribunal mentioned the findings of fact recorded by the Appellate Assistant Commissioner and added :

> "It is to be noted that the findings of fact given by the Appellate Assistant Commissioner as quoted from this order above have not at all been challenged before us in these appeals"

The findings of fact, to which this sentence referred, included the finding recorded by the Appellate Assistant Commissioner that it was a contract for removal of sand lying on the surface of the river-beds within a specified period and no excavation or skilful extraction was involved No doubt, this finding of fact was partially based on the personal investigation made by the Appellate Assistant Commissioner and this investigation was made, as held by the High Court, about six years after the lease contract had been entered into The High Court was of the view that it was difficult to see how, after a lapse of six years, the terms of the lease deed could be varied, altered or clarified so as to confer any benefit on the lessee, and that the lease-deed contained absolutely no reference to the accumulation of sand as the result of floods, its lying loose on the surface and the lessee being allowed to remove the sand merely from the surface without digging underneath. In examining this question of fact, it is clear that the High Court exceeded its jurisdiction. The finding of fact recorded by the Appellate Assistant Commissioner had been affirmed by the Tribunal and no question was referred to the High Court that it was a finding which was based on no evidence. Whether the evidence on which the finding was accepted by the Tribunal was good or bad did not fall for consideration by the High Court. The finding being binding on the High Court, that Court should have proceeded on the basis that these facts did exist and should have examined the legal position on that premise. This circumstance that the sand was lying loose and merely required removal without any excavation or digging makes it clear that what the assessee was taking under the lease for the purpose of his business was the right to remove that sand and that he was not acquiring the land or any other rights in the land for any other purpose. Then, there is the additional fact that the lease was for a very short period of 11 months. On these facts, the conclusion was irresistible that, in agreeing to pay this large sum of Rs. 82,500, the assessee was bargaining for the right to remove the sand lying loose on the land within that short period of 11 months to the extent to which he could do so. He did not acquire any fixed or capital asset of an enduring nature by obtaining this lease and all he had in view was to have the right to obtain his stock-in-trade in the form of sand.

During the course of arguments before us, a number of cases were brought to our notice which related to quarrying leases of various types in India and in England. We do not consider it necessary to refer to those cases, because the question whether a particular expenditure is of a capital nature or is a revenue expenditure has always to be decided on the special facts of each case. We may, however, make a reference to the decision of this Court in *Gotan Lime Syndicate* v. *Commissioner of Income-tax, Rajasthan and Delhi*[1]. In that case also, Rule 13 of the Rajasthan Minor Mineral Concession Rules, 1955, which was applicable, provided that the lease shall be in respect of plots comprising of 5 square miles each. The lessee was even entitled to transfer his lease or any right, title or interest therein to a person holding a certificate of approval on payment of a fee, subject to the previous sanction of the Director of Mines and Geology, and subject to some other conditions. Rule 18 prescribed a period of 5 years for a lease and the lease was renewable at the option of the assessee

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1 (1966) 1 I.T.J. 390 (1966) 59 I.T.R. 718: (1966) 1 S.C.J. 452 : (1966) 2 S.C.R. 596.

for a further period of five years. Even on these facts, this Court held that the lessee in that case, in obtaining the lease and paying lease money, had not incurred an expenditure of a capital nature, and was entitled to claim that the lease money paid by him was a revenue expenditure. In that case also, thus, the lease was in respect of plots, so that interest in land was conveyed, but the Court, on considering the object of the lease and the manner in which the rights under it were to be exercised, came to the finding that no capital expenditure was involved and that the only right acquired was the right to obtain raw material from the leased land. The payment was not for securing an enduring advantage. In the case before us, the facts are much stronger in favour of the assessee. The period of lease is shorter and the only object of the lease is to remove sand lying loose on the surface, without exercising any other right on the land included in the lease.

In *Bombay Steam Navigation Co* (1953) *Private Ltd.* v. *Commissioner of Income-tax, Bombay*[1], this Court explained the principle of determining the nature of an expenditure. The Court held :

"Whether a particular expenditure is revenue expenditure incurred for the purpose of business must be determined on a consideration of all the facts and circumstances, and by the application of principles of commercial trading The question must be viewed in the larger context of business necessity or expediency If the outgoing or expenditure is so related to the carrying on or conduct of the business, that it may be regarded as an integral part of the profit-earning process and not for acquisition of an asset or a right of a permanent character, the possession of which is a condition of the carrying on of the business, the expenditure may be regarded as revenue expenditure "

Clearly, in the present case, the expenditure incurred by the assessee was not related to the acquisition of an asset or a right of a permanent character. It was for the specific object of enabling the assessee to remove sand lying loose on the surface which was the stock-in-trade of the business of the assessee, so that the expenditure has to be regarded as revenue expenditure.

Counsel appearing for the Department relied on a decision of this Court in *K T M T M Abdul Kayoom and Another* v *Commissioner of Income-tax*[2] The majority judgment in that case shows that the assessee, which was carrying on business in "conch" shells locally known as "chanks", took on lease the exclusive right, liberty and authority to take and carry away all chanks found in the sea for a period of three years ending on 30th June, 1947, along a specified portion of the coast The consideration of Rs 6,111 per year was payable in advance. It was held on the facts of that case that "this expenditure was of the nature of capital expenditure and not revenue expenditure." On the face of it, the distinguishing feature was that, in that case, the lessee had to obtain fish from the sea and, consequently, had to operate in the waters of the sea itself, and that was the main reason why the Court held against the assessee. This difference is clearly brought out in the judgment of the majority where it was held —

"This is not a case of so much clay or so much salt-petre or a dump of tailings or leaves on the trees in a forest The two modes in which the respondent did the business furnish adequate distinguishing characteristics Here is an agreement to reserve a source, where the respondent hoped to find shells which, when found, became its stock-in-trade but which *in situ*, were no more the firm's than a shell in the deepest part of the ocean beyond the reach of its divers and nets. The expenses of fishing shells were its current expenses as also the expenses incurred over the purchase of shells from the divers But to say that the payment of lease money for reserving an exclusive right to fish for chanks was on a par with payments of the other character is to err "

It is clear that, in the present case, there is no such reservation of an exclusive right in respect of any land. In fact, the first sentence in the quotation above is clearly applicable to the present case if, for the word "clay", the word "sand" is substituted The present is a case where sand lying loose on the surface of the land is to be removed and the whole object of the lease was to obtain the right to the sand which was to be the stock-in-trade of the assessee. The appeals are, consequently, allowed with costs, the order of the High Court is set aside and the question referred is answered in the affirmative.

T.K K —— *Appeals allowed.*

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1 (1965) 1 I T J 668 (1965) 1 S C J 719 (1965) 1 S C.R 770 . 56 I T R 52 at p 59

2 (1962) 44 I.T R 689 at p 707 (1962) 2 S C R (Supp) 518 A I R 1962 S C 680

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—M. HIDAYATULLAH, V. BHARGAVA AND C. A. VAIDIALINGAM, JJ.

The Secretary, Madras Gymkhana Club Employees' Union .. *Appellant**

v.

The Management of the Gymkhana Club .. *Respondent.*

Industrial Disputes Act (XIV of 1947), section 2 (j)—' Industry '—Attributes and tests of—Members' clubs like the Madras Gymkhana club—If ' industry '.

The definition of ' industry ' in section 2 (*j*) of the Industrial Disputes Act is in two parts. In its first part it means any business, trade, undertaking, manufacture or calling of employers. This part of the definition determines an industry by reference to occupation of employers in respect of certain activities. These activities are specified by five words and they determine what an industry is and what the cognate expression ' industrial ' is intended to convey. The second part views the matter from the angle of employees and is designed to include something more in what the term primarily denotes. By the second part any calling, service, employment, handicraft or industrial occupation or avocation of workmen is included in the concept of industry. This part gives the extended connotation. If the activity can be described as an industry with reference to the occupation of the employers, the ambit of the industry, under the force of the second part, takes in the different kinds of activity of the employees mentioned in the second part. But the second part standing alone cannot define industry. An industry is not to be found in every case of employment. An individual who employes a cook gets service from his employee whose avocation is to serve as a cook but as the activity of the individual is neither business, nor trade, nor an undertaking nor manufacture, nor calling of an employer, there is no industry. By the inclusive part of the definition the labour force employed in an industry is made an integral part of the industry for purposes of industrial disputes although industry is ordinarily something which employers create or undertake.

Primarily, therefore, industrial disputes occur when the operation undertaken rests upon co-operation between employers and employees with a view to production and distribution of material goods, in other words, wealth, but they may arise also in cases where the co-operation is to produce material services. The normal cases are those in which the production or distribution is of material goods or wealth and they will fall within the expressions, trade, business and manufacture. The word 'trade' in this context bears the meaning which may be taken from Halsbury's Laws of England, Third Edition, Volume 38, page 8—(*a*) exchange of goods for goods or goods for money ; (*b*) any business carried on with a view to profit, whether manual, or mercantile as distinguished from the liberal arts or learned professions and from agriculture ; and business means an enterprise which is an occupation as distinguished from pleasure. Manufacture is a kind of productive industry in which making of articles or material is by physical labour or mechanical power. Calling denotes the following of a profession or trade.

These words have a clear signification and are intended to lay down definite tests. Therefore the principal question and the only legitimate method, is to see where under the several categories mentioned, a particular venture can be brought. Of these categories ' undertaking ' is the most elastic. This word must be defined as ' any business or any work or project which one engages in or attempts as an enterprise ' *analogous to business or trade* '. It is not necessary that the employer must always be a private individual who carries on the operation with his own capital and with a view to his own profit The Act in terms con-

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* C.A No 572 of 1966. 3rd October, 1967.

templates cases of industrial disputes where the Government or a local authority or a public utility may be the employer.

Next where the activity is to be considered as an industry, it must not be casual but must be distinctly systematic. The work for which labour of workmen is required must be productive and the workmen must be following an employment calling or industrial avocation. The salient fact in this context is that the workmen are not their own masters but render service at the behest of masters. This follows from the second part of the definition of 'industry' in section 2 (*j*) of the Act.

Industry is the nexus between employers and employees and it is this nexus which brings two distinct bodies together to produce a result. The test that the workmen must not share in the product of their labours cannot be regarded as universal. There may be occasions when the workmen may receive a share of the produce either as part of their wages or as bonus or as a benefit.

The Madras Gymkhana Club, being a members' club, is not an 'industry'. None of the following considerations, namely, (*a*) that the club is organised as an industry is organised on a vast scale with multifarious activities, (*b*) that facilities of accommodation, catering, sale of alcoholic and non-alcoholic beverages, games, etc., are provided, (*c*) that the club runs parties at which guests are freely entertained and that (*d*) the club has established reciprocal arrangements with other clubs for its members, is sufficient to establish that the club is an 'industry' within the meaning of Industrial Dispute Act.

The club does not follow a trade or business. Its activity cannot be described as manufacture and the running of clubs is not the calling of the members or its managing committee. Nor is it an 'undertaking'. It is true that the affairs of the club are organised in the way business is organised and that there is production of material and other services and in a limited way production of material goods mainly in the catering department. But these circumstancs are not truly representative in the case of the club because the services are to the members themselves for their own pleasure and amusement and the material goods are for their consumption. In other words the club exists for its members. It has no existence apart from its members.

Appeal by Special Leave from the Award dated the 2nd September, 1964, of the Industrial Tribunal, Madras in Industrial Dispute No. 19 of 1964.

B. R. Dolia, E. C. Agrawala, Champat Rai, Kartar Singh Suri, Ambrish Kumar and *P. C. Agrawala*, Advocates, for Appellant

H. R. Gokhale, Senior Advocate, (*M. R Narayanaswamy Iyer* and *R. Ganapathy Iyer*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Hidayatullah, J.—The Industrial Tribunal, Madras by its award, 2nd September, 1964, has held that the management of the Gymkhana Club, Madras is not liable to pay bonus to its workmen for the year 1962 as the Club is not 'an industry'. The Madras Gymkhana Club Employees Union now appeals to this Court by Special Leave.

The Madras Gymkhana Club is admittedly a members' club and not a proprietary club. On 31st December, 1962 its membership was about 1,200 with 800 active members. The object of the club is to provide a venue for sports and games and facilities for recreation and entertainment. For the former, it maintains a golf course, tennis courts, rugby and football grounds and has made arrangement for billiards, pingpong and other indoor games. As part of the latter activities it arranges dance, dinner and other parties and runs a catering department, which provides food and refreshments not only generally but also for dinners and parties on special occasions. The club employs six officers (a Secretary, a Superintendent and four Accountants and Cashiers), twenty clerks and a large number of peons,

stewards, butlers, gate-attendants, etc. Its catering department has a separate managerial, clerical and other staff. Altogether there are 194 employees. The affairs of the club are managed by a Committee elected annually. Two of the members of the Committee work as Hony. Secretary and Hony. Treasurer respectively.

The membership of the club is varied There are resident members, non-resident members, temporary members, garrison members, independent lady members, etc. The resident members pay an entrance fee of Rs 300 and Rs 20 per month as subscription. Garrison members and independent lady members do not pay any entrance fee and their subscription is Rs 10 per month. Guests, both local and from outside, are admitted subject to certain restrictions as to the number of days on which they can be invited to the club. The club runs tournaments for the benefit of members and for exhibition to non-members. The income and expenditure of the club are of the order of four and a quarter lakh rupee, its movable and immovable properties are worth several lakh rupees and its wage bill is between one and two lakh rupees. The question in this appeal is whether the respondent club can be said to be an industry for the application of the Industrial Dispues Act, 1947. The Tribunal, after considering many decisions rendered by this Court and also by the High Courts in India, came to the conclusion that the club was not an industry and the claim for bonus on behalf of its empolyees was therefore unsustainable. The appellant union contends that the decision of the Tribunal is not correct and that the club must be treated as an industry for the appliation of the Act.

As we are concerned primarily with the question whether the club comes within the definition of ' industry ' as given in the Industrial Disputes Act, we may begin by reading that definition and other provisions which have a bearing upon the question. The Industrial Disputes Act was passed to make provisions for the investigation and settlement of industrial disputes and for certain other purposes appearing in the Act. The emphasis in the Act is primarily upon the investigation and settlement of industrial disputes. The expression "industrial dispute" is defined by section 2 (*k*) as follows :—

> "industrial dispute" means any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."

"Industry" is defined in clause (j) as follows :—

> "industry" means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen."

The word "employer" is defined by clause (*g*) of the section as—

> "employer means—
>
> (i) in relation to an industry carried on by or under the authority of any department of the Central Government or a State Government, the authority prescribed in this behalf, or where no authority is prescribed, the head of the department;
>
> (ii) in relation to any industry carried on by or on behalf of a local authority, the chief executive officer of that authority;"

"Workman" is defined by clause (*s*) of the section and—

> "means any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervison, technical or clerical work for hire or reward, whether the terms of employment be expressed or implied, and for the purpose of any proceeding under this Act in relation to an industrial dispute, includes any person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal,

discharge or retrenchment has led to that dispute, but does not include any such person—

(i) who is subject to the Army Act, 1950, or the Air Force Act, 1950, or the Navy (Discipline) Act, 1934; or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

These definitions have been before this Court on many occasions and we have reached a point when one can say that at least some attributes of "industry" and "industrial disputes" may be taken as well-established. These cases concerned such diverse institutions and establishments as municipalities, hospitals, solicitor's firm and university Any enquiry to determine the application of the definitions to new establishments cannot overlook the settled view. We find it convenient to say a few words about the earlier decisions of this Court, before embarking upon an analysis of the definitions in relation to a members' club.

The earliest case in this Court involved a dispute between a Municipality and its employees (*D N. Banerjee* v. *P. B. Mukherjee and others*[1]). The Municipality was held to be an industry and the dispute was held to be an industrial dispute. This Court observes that the non-technical or ordinary meaning of "industry" is "an undertaking where capital and labour co-operate with each other for the purpose of producing wealth in the shape of goods, machines, tools, etc." and for making profits, and an industry in this sense includes agriculture, horticulture, etc. The Court points out that this is too wide and that every aspect of employer-employee connection does not result in an industry. Holding, however, that municipal activity cannot be truly regarded as business or trade, this Court considers whether it can be an 'undertaking.' The suggestion that the word 'undertaking' takes its colour from the other four words in the first part of the definition is not accepted. It is said that this interpretation renders the word superfluous and the latter part of the definition unnecessary. Therefore, this Court includes non-profit undertakings in the concept of industry even if there is no private enterprise. Referring to the inclusion of public utility services in the scheme of the Act it is held that a dispute in a public utility service is an industrial dispute, and the fact that the enterprise is financed by taxation and not by capital is considered irrelevant. In formulating these dicta the Court is obviously influenced by the analysis of an industrial dispute by Issacs and Rich, JJ , in *Federated Municipal and Shire Council Employees of Australia* v. *Melbourne Corporation*[2].

"Industrial disputes occur when, in relation to operations in which capital and labour are contributed in co-operation for the satisfaction of human wants and desires, those engaged in co-operation dispute as to the basis to be observed, by the parties engaged, respecting either a share of the produce or any other terms and conditions of their co-operation * * * * The question of profit-making may be important from an income-tax point of view, as in many municipal cases in England, but, from an industrial dispute point of view, it cannot matter whether the expenditure is met by fares from passengers or from rates "

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1 (1953) S C J 19 (1953) 1 M L J 195 (1953) S C R 302

2 26 Com.L.R. 508.

In the second case (*Baroda Borough Municipality* v. *Workmen*[1]) a claim for bonus by municipal employees was rejected on the ground that the bonus formula was inapplicable. The Court, however, went on to observe:

"It is now finally settled by the decision of this Court in *D. N. Banerjee* v. *P. B. Mukherjee and others*[2] that a municipal undertaking of the nature we have under consideration is an "industry" within the meaning of the word in section 2 (*j*) of the Industrial Disputes Act and that the expression "industrial dispute" in that Act includes disputes between the municipality and their employees in branches of work *that can be regarded as analogous to the carrying on of a trade or business*." (emphasis added).

These two cases lay down that for an activity to be an industry it is not necessary that it must be carried on by private enterprise or must be commercial or result in profit. It is sufficient if the activity is analogous to the carrying on of a trade or business and involves co-operation between employers and employees. This result is reached by extending the meaning of 'undertaking' to cover adventures not strictly trade or business but objects very similar.

The definition of 'employer' in our Act clearly shows that a local authority may become an employer if it carries on an industry. "This means that a municipality, if it indulges in an activity which may be properly described as industry, may be involved in an industrial dispute. Local bodies are primarily subordinate branches of governmental activity. They function for public purposes but some of their activities may come within the calling of employers although the municipalities may not be trading corporations. Local authorities take away a part of the affairs of Government in local areas and they exercise the powers of regulation and subordinate taxation. They are political sub-divisions and agencies for the exercise of governmental functions. But if they indulge in municipal trading or business or have to assume the calling of employers they are employers whether they carry on or not business commercially for purposes of gain or profit.

The activity of the municipality in the first two cases was not attempted to be brought within the expressions business and trade. The term 'undertaking' was held to cover it. In the third case (*Corporation of City of Nagpur* v. *Employees*)[3], the need to consider 'trade and business' arose directly. The question then was whether and to what extent the Corporation of Nagpur was an industry under the C. P. & Berar Industrial Disputes Settlement Act, 1947? That Act included a definition of industry which was different. It included

"(*a*) any business, trade, manufacturing or mining undertaking or calling of employers;

(*b*) any calling, service, employment, handicraft or industrial occupation or avocation of employees, and

(*c*) any branch of an industry or a group of industries."

In this definition the qualifying words 'manufacturing or mining' limited the word 'undertaking' and it could not be given the wide meaning given earlier. This Court did not attempt to bring municipal activity within the word 'undertaking' but brought it within the expression 'trade and business.' The Court observed that there was nothing in the earlier cases to show that a municipal activity was held excluded from those words. As a matter of fact it did (see page 308). Of course, there was nothing to show that this Court on the earlier two occasions thought it even remotely possible. In the *Nagpur Corporation's case*[3], the Court proceeded to consider whether a corporation could be legitimately said to be carrying on business or trade or calling." It found the definition to be "very clear" and "not susceptible of any ambiguity", and observed that all the words were very wide and

1. (1957) S.C.J. 95 : (1957) S.C.R. 33 : (1957) 1 Lab.L.J. 8.
2. (1953) S.C.J. 19 : (1953) 1 M.L.J. 195 : (1953) S.C.R. 302.
3. (1960) 2 S.C.R. 942 : A.I.R. 1960 S.C. 675.

that even if the meaning could be cut down by the aims and objects of the C P. and Berar Act as disclosed in the preamble, the main object, namely, social justice demanded a wide meaning. The Court distinguished between (*a*) regal and (*b*) municipal functions of the Corporation and found the latter analogous to business or trade because they were not regal and the activity was organised and service was rendered. To distinguish between a regal function and a municipal function the test applied was: Can the service be performed by an individual or firm for remuneration? This test was not applied in one later case but is not enlightening because there is hardly any activity which private enterprise cannot carry on. As Mr. Gomme in his Principles of Local Government (1897) observes: "Any municipal service can be made to pay dividends on private capital if only the means of levying a revenue are granted to private owners." Even war can be financed and waged by commercial houses They manufacture ammunition and war equipment and can carry on war with mercenaries. Even the infra-structures of Adam Smith can be provided by private enterprise. The East India Company did both. It is not a little surprising that except in one case in which there is a passing reference to it, the *Corporation of City of Nagpur case*[1], has not been referred to in the later cases of this Court.

The later cases of this Court view the matter a little differently and formulate further tests. Of the tests, the first is that the activity must be organised as business or trade is ordinarily organised. This is to be taken with the earlier test that 'undertaking' must be analogous to business, trade or calling. It will be seen that these do not widen the meaning of 'undertaking' but tend to narrow it. The second is that the activity need not necessarily be preceded by procurement of capital in the business sense nor must profit be a motive. So long as relationship of employer and workmen is established with a view to production of material goods or material services, the activity must be regarded as an undertaking analogous to trade or business We shall now review the cases in which these tests are established.

In the *State of Bombay* v. *Hospital Mazdoor Sabha*[2], it is held that a hospital run by Government is included in the definition of 'industry.' It is recognised that the first part of the definition contains the statutory meaning and the second part means "an enlargement of it by including other items of industry." As a matter of fact these are not *other items of industry but aspects of occupation* of employees which are intended to be an integral part of an industry for purposes of industrial disputes. It is, however, recognised in the case that a line must be drawn to exclude some callings, services and undertakings It is held that domestic, personal or casual services are not included and examples are given of such services. The meaning of industry as 'an economic activity' involving investment of capital and systematically carried on for profit for the production or sale of goods by the employment of labour is again discarded because profit motive and investment of capital are considered unessential. Another test reaffirmed is to enquire 'can such activity be carried on by private individual or group of individuals? Answering that a hospital can be run by a private party for profit, it is held that a hospital is an industry even if it is run by Government without profit. Who conducts the activity or whether it is for profit, are considered irrelevant questions. It is, however, again emphasised that an undertaking to be an industry must be analogous to trade or business. It is, therefore, laid down that an activity systematically or habitually undertaken for the production or distribution of goods or for rendering material services to the community at large or a part of such community with the help of employees is an undertaking. In this way, the connection between trade and business on the one hand and undertaking on the other is established which seems to indicate that the expression 'undertaking' must take its colour from the other expressions. An industry is thus said to involve co-operation between employer and employees for the object of satisfying material human needs but not for oneself nor for pleasure

1. (1960) 2 S C R. 942.
2. (1960) S C J. 679 (1960) 2 S C.R. 866.

nor necessarily for profit. These dicta are based on the observations of Isaac, J. quoted earlier and in a later case [*The Federated State School Teachers' Association of Australia* v. *The State of Victoria and others*[1]].

In the next case *Ahmedabad Textile Industry Research Association* v. *State of Bombay*[2], the question was whether an Association for research maintained by the textile industry and employing technical and other staff was industry The case repeated the tests stated in the *Hospital case*[3] and applied them. It was held that the Association was providing material services to a part of the community, was carried on with the help of employees, was organised in a manner in which trade or business is organised and there was co-operation between employers and employees. For the first time a fresh test was added that the employees had no rights in the results of their labour or in the nature of business and trade the partnership is only association between the employer and employee.

However, in the next case of *National Union of Commercial Employees* v. *M. R. Meher*[4], where the employees of a firm of solicitors demanded bonus and the case satisfied the tests so far enumerated, a new test was added that the association of capital and labour must be direct and essential. The service of a solicitor was regarded as individual depending upon his personal qualifications and ability to which the employees did not contribute directly or essentially. Their contribution, it was held, had no direct or essential nexus with the advice or services In this way learned professions were excluded.

In the next two cases the difficulty of laying down tests from case to case was felt. In *Harinagar Cane Farm* v *The State of Bihar*[5], a cane farm was purchased by a sugar factory and worked as a department for supply of sugarcane The agricultural operations were held to be an industry on the facts but it was held that agriculture under all circumstances could not be called an industry. This Court reversed its method of looking for the tests from other cases and referred to them only after it had reached its conclusion observing that the Court must refrain from laying down unduly broad or categorical propositions.

In the next case (*University of Delhi and another* v *Ramnath*[6]) the question was whether bus drivers employed by the University were workmen. The concept of service was narrowed and it was held that the educational institutions were not an industry. Their aim was education and the teachers profession was not to be assimilated to industrial workers This Court again stated that it must not be understood as laying down a general proposition.

The changes made in the meaning of the expressions used in the definition of industry in the Act, disclose a procrustean approach to the problem The words must mean something definite, but some of the tests were found unsatisfactory to cover new cases as the creation of new tests clearly shows For example, the emphasis resulting from the extension of the definition is its latter part to include services of employees, received little recognition in the later cases Too much insistence upon partnership between employers and employees is evident in the *Solicitors case*[4] and two little in the *Association case*[2] And yet it is impossible to think that this test is universal. What partnersihp can exist between the Company and/or Board of Directors on the one hand and the menial staff employed to sweep floors on the other? What direct and essential nexus is there between such employees and production? This proves that what must be established is the existence of an industry viewed from the angle of what the employer is doing and if the definition from the angle of the employer's occupation is satisfied, all who

1. 41 Com L R 569
2. (1961) 2 S C R 480. A I R 1961 S C 484
3. (1960) S C J 679 (1960) 2 S C R 866
4. (1962) 3 S C.R (Supp) 157 A I R 1962 S C 1080
5. (1964) 2 S C J 806 · (1964) 2 S C R 458
6. (1965) 1 S C J 57 (1964) 2 S C R. 703 A I R 1963 S C 1873

render service and fall within the definition of workman come within the fold of industry irrespective of what they do. There is then no need to establish a partnership as such in the production of material goods or material services. Each person doing his appointed task in an organisation will be a part of the industry whether he attends to a loom or merely polishes door handles. The fact of employment as envisaged in the second part is enough provided there is an industry and the employee is a workman. The learned professions are not industry not because there is absence of such partnership but because viewed from the angle of the employer's occupation, they do not satisfy the test. A solicitor earns his livelihood by his own efforts. If his work requires him to take help from menials and other employees who carry out certain assigned duties, the character of the solicitor's work is not altered. What matters is not the nexus between the employee and the product of the employer's efforts but the nature of the employer's occupation. If his work cannot be described as an industry his workmen are not industrial workmen and the disputes arising between them are not industrial disputes The cardinal test is thus to find out whether there is an industry according to the denotation of the word in the first part. The second part will then show what will be included from the angle of employees. We shall now apply this approach to the definition in the light of the earlier decisions of this Court in so far as they are consistent and then determine whether the club in this case can come within the meaning of 'industry' as determined by us.

The definitions have been set out by us earlier in this judgment. The definitions are interrelated and are obviously knit together. Stated broadly the definition of 'industrial dispute' contains two limitations. Firstly, the adjective 'industrial' relates the dispute to an industry as defined in the Act and, secondly, the definition expressly states that not disputes and differences of all sorts but only those which bear upon the relationship of employers and workmen and the terms of employment and conditions of labour are contemplated. As such dispute may arise between different parties, the Act equally contemplates disputes between employers and employers or between employers and workmen or between workmen and workmen. The definition of the expression 'industrial dispute' further shows that certain disputs can never be considered under the Act. For example, disputes between Government and an industrial establishment or between workmen and non-workmen are not the kind of disputes of which the Act take notice.

The word 'employer' is not specifically defined but merely indicates who is to be considered an employer for purposes of an industry carried on by or under authority of a department of Government and by or on behalf of a local authority. This definition gives little assistance because it is intended to operate in relation to an activity properly describable as an industry and this takes one back to the definition of 'industry'. The definition of 'workman' is a little better. Although it again refers one back to an industry, it gives some guidance. Workman means any person employed to do skilled or unskilled manual, supervisory, technical or clerical work for hire or reward. The expression, however, does not include persons employed in some named services of Government. Even in an industry those employed mainly in a managerial or administrative capacity and supervisors drawing more than five hundred rupees as wages or exercising functions mainly of a managerial nature, are also to be left out of the definition In this way the general nature of the dispute, the parties to the dispute and the contents of the dispute are, therefore, reasonably clear. A dispute must however be an *industrial dispute* or, as the several definitions already noticed say, must arise *in relation* to an *industry*. This is where the difficulty begins because the statutory definition of 'industry' has led to some divergence of views in the Labour Tribunals, the High Courts and even in this Court.

The definition of 'industry' is in two parts In its first part it means any business, trade, undertaking, manufacture or calling of employers. This part of the definition determines an industry by reference to occupation of employers in respect

of certain activities. These activities are specified by five words and they determine what an industry is and what the cognate expression 'industrial' is intended to convey. This is the denotation of the term or what the word denotes. We shall presently discuss what the words "business, trade, undertaking, manufacture or calling" comprehend. The second part views the matter from the angle of employees and is designed to include something more in what the term primarily denotes. By the second part of the definition any calling, service, employment, handicraft or industrial occupation or avocation of workmen is included in the concept of industry. This part gives the extended connotation. If the activity can be described as an industry with reference to the occupation of the employers, the ambit of the industry, under the force of the second part, takes in the different kinds of activity of the employees mentioned in the second part But the second part standing alone cannot define 'industry'. An industry is not to be found in every case of employment or service. An individual who employs a cook gets service from his employee whose avocation is to serve as a cook but as the activity of the individual is neither business, nor trade, nor an undertaking, nor manufacture, nor calling of an employer, there is no industry. By the inclusive part of the definition the labour force employed in an industry is made an integral part of the industry for purposes of industrial disputes although industry is ordinarily something which employers create or undertake.

The definitions in the Industrial Disputes Act are borrowed from other statutes. The definition of 'industrial dispute' is taken from an Act of 1906 (6 Edw. VII c. 47) and slightly modified. There the definition ran—

"any dispute between employers and workmen, which is connected with the employment or non-employment, or the terms of the employment or with the conditions of labour, of any person".

Our definition only adds to the list of disputes one between employers and employers. Similarly, the latter part of the definition of 'industry' which has caused us some trouble is taken from section 4 of the Commonwealth Conciliation and Arbitration Act which includes in the concept of industry—

"any calling, service, employment, handicraft or industrial occupation or avocation of employers, on land and water."

Decisions rendered on these definitions (and some others very similar) have naturally influenced opinion-making in this Court The Australian cases in particular have been *sub rose* all the time. The difficulty in using Australian cases with a text-book approach is perhaps not quite noticed. The term 'industrial dispute' which the Australian High Court was defining was from section 51 (XXXV) of the Constitution Act. There was no definition of the expression and it was recognised that the common understanding of that expression was not what was meant but something different. In a great body of cases the problem presented its many facets and the approach was pragmatic. Higgins, J., *Federated Municipal and Shire Council Employees of Australia* v. *Melbourne Corporation*[1] cautioned against giving a crystallised meaning to the expression. He observed:

"It is not necessary—or, as I think, desirable—that we should, in answering the specific question asked of us, commit ourselves to a final, exhaustive definition of a popular phrase as that in question". (page 574).

In the *Harinagar Cane Farm*[2] and the *University cases*[3], this Court also made a similar observation In the former it was observed:

"We have referred to these decisions only to emphasise the point that this Court has consistently refrained from laying down unduly broad or categorical propositions.... ....".

The attempt to avoid generalisations (however commendable) has one disadvantage. In Australia the Courts were dealing with the problem *without a defini-*

1. 26 Com.L R 508.
2. (1964) 2 S.C.R. 458: (1964) 2 S.C.J. 806.
3 (1965) 1 S C J. 57: (1964) 2 S C R. 703.

tion and thought that they should move cautiously to avoid hardening any particular view too far. We have all the terms except 'employer' defined by the statutes. Our task is to give meanings to the words which are intended to lay down the full connotation. Taking each operation by itself and determining on the basis of facts whether it is an industry without attempting to pin-point whether it is a business, or a trade, or an undertaking, or manufacture, or calling of employers, is to ignore somewhat the guidance afforded by the statute through its own dictionary. Therefore, while we accept the views expressed uniformly we think any view which seems contradicted by later decisions because it was unrelated to the words of the definitions should not be allowed to harden. We also take the opportunity of relying a little more on the guidance from the Act.

The principles so far settled come to this. Every human activity in which enters the relationship of employers and employees, is not necessarily creative of an industry. Personal services rendered by domestic and other servants, administrative services of public officials, service in aid of occupations of professional men, such as doctors and lawyers, etc., employment of teachers and so on may result in relationships in which there are employers on the one side and employees on the other but they must be excluded because they do not come within the denotation of the term 'industry'. Primarily, therefore, industrial disputes occur when the operation undertaken rests upon co-operation between employers and employees with a view to production and distribution of material goods, in other words, wealth, but they may arise also in cases where the co-operation is to produce material services. The normal cases are those in which the production or distribution is of material goods or wealth and they will fall within the expressions trade, business and manufacture. The word 'trade' in this context bear the meaning which may be taken from Halsbury's Laws of England, Third Edition, Volume 38, page 8—

(*a*) exchange of goods or goods for money;

(*b*) any business carried on with a view to profit, whether manual, or mercantile, as distinguished from the liberal arts or learned professions and from agriculture;

and business means an enterprise which is an occupation as distinguished from pleasure. Manufacture is a kind of productive industry in which the making of articles or material (often on a large scale) is by physical labour or mechanical power. Calling denotes the following of a profession or trade.

These words have a clear signification and are intended to lay down definite tests. Therefore the principal question (and the only legitimate method) is to see where under the several categories mentioned, a particular venture can be brought. Of these categories 'undertaking' is the most elastic. According to Webster's dictionary, 'undertaking' means 'anything undertaken' or 'any business, work or project which one engages in or attempts, as an enterprise.' It is this category which has figured in the cases of this Court. It may be stated that this Court began by stating in *Banerji's case*[1], that the word 'undertaking' is not to be interpreted by association with the words that precede or follow it, but after the *Solicitor's*[2] and the *University cases*[3], it is obvious that liberal arts and learned professions, educational undertakings and professional services dependent on the personal qualifications and ability of the donor of services are not included. Although business may result in service the service is not regarded as material. That is how the service of a Solicitor firm is distinguished from the service of a building corporation. Otherwise what is the difference between the services of a typist in a factory and those of another typist in a Solicitor's office or the service of a bus driver in a municipality and of a bus driver in a University? The only visible difference is that in the one case the operation is a part of a commercial establishment producing material goods or material services and in the other there is a non-commercial undertaking.

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1. (1953) S.C.J. 19 : (1953) 1 M.L.J. 195 : (1953) S.C.R. 302.
2. (1962) 3 S.C.R. (Supp.) 157 : A.I.R. 1962 S.C. 1080.
3. (1995) 1 S.C.J. 57 : (1964) 2 S.C.R. 703.

The distinction of an essential or direct connection does not appear to be so strong as the distinction that in the one case the result is the production of material goods or services and in the other not.

It is, therefore, clear that before the work engaged in can be described as an industry, it must bear the definite character of 'trade' or 'business' or 'manufacture' or 'calling' or must be capable of being described as an undertaking resulting in material goods or material services. Now in the application of the Act, the undertaking may be an enterprise of a private individual or individuals On the other hand, it may not. It is not necessary that the employer must always be a private individual who carries on the operation with his own capital and with a view to his own profit. The Act in terms contemplates cases of industrial disputes where the Government or a local authority or a public utility service may be the employer.

The expansion of Governmental or municipal activity in fields of productive industry is a feature of all developing welfare States. This is considered necessary because it leads to welfare without exploitation of workmen and makes the production of material goods and services cheaper by eliminating profits. Government and local authorities act as individuals do and the policy of the Act is to put Government and local authorities on a par with private individuals. But Government cannot be regarded as an employer within the Act if the operations are governmental or administrative in character. The local authorities also cannot be regarded as industry unless they produce material goods or render material services and do not share by delegation in governmental functions or functions incidental thereto. There is no essential difference between educational institutions run by municipalities and those run by universities. And yet a distinction is sought to be made on the dichotomy of regal and municipal functions. Therefore, the word 'undertaking' must be defined as "any business or any work or project which one engages in or attempts as an enterprise analogous to business or trade." This is the test laid down in *Banerji's case*[1] and followed in the *Baroda Borough Municipality case*[2] Its extension in the *Corporation case*[3] was unfortunate and contradicted the earlier cases.

Next where the activity is to be considered as an industry it must not be casual but must be distinctly systematic. The work for which labour of workmen is required, must be productive and the workmen must be following an employment, calling or industrial avocation. The salient fact in this context is that the workmen are not their own masters but render service at the behest of masters. This follows from the second part of the definition of industry. Then again when private individuals are the employers, the industry is run with capital and with a view to profits. These two circumstances may not exist when Government or a local authority enter upon business, trade, manufacture or an undertaking analogous to trade.

The labour force includes not only manual or technical workmen but also those whose services are necessary or considered ancillary to the productive labour of others but does not include any one who, in an industrial sense, will be regarded, by reason of his employment or duties, as ranged on the side of the employers. Such are persons working in a managerial capacity or highly paid supervisors.

Further the words are "industrial dispute" and not "trade dispute". Trade is only one aspect of industrial activity ; business and manufacture are two others. The word also is not industry in the abstract which means diligence or assiduity in any task or effort but a branch of productive labour. This requires co-operation in some form between employers and workmen and the result is directly the product of this association but not necessarily commercial. The expressions 'terms of employment' and 'conditions of labour' indicate the kind of conflict between those engaged in industry on opposite but co-operating sides. These words take in dispute as to the share in which the receipts in a commercial venture shall be divided

1. (1953) S.C.J. 19 : (1953) 1 M.L.J. 195 : (1953) S.C.R. 302.
2. (1957) S.C.J. 95 : (1957) S.C.R. 33 : (1957) 1 Lab.L.J. 8.
3. (1960) 2 S.C.R. 942 : A.I.R. 1960 S.C. 675.

and generally cover hours of work and rest, recognition of representative bodies of workmen, payment for piece work, wages—ordinary and overtime, benefits, holidays etc The definition takes in disputes between employees and employees such as demarcation disputes and disputes between employers and employers such as wage warfare in an area where labour is scarce and disputes of a like character. The whole paraphernalia of settlement, conciliation, arbitration (voluntary as well as compulsory) agreements, awards etc shows that human labour has value beyond what the wages represent and therefore is entitled to corresponding rights in an industry and employers must give them their due Industry is the nexus between employers and employees and it is this nexus which brings two distinct bodies together to produce a result We do not think that the test that the workmen must not share in the product of their labours adopted in one case can be regarded as universal There may be occasions when the workmen may receive a share of the produce either as part of their wages or as bonus or as a benefit.

This ends discussion of what is an industry. We are now in a position to consider whether the Madras Gymkhana Club fulfils the tests laid down by this Court and accepted here by us. In support of the claim on behalf of the Employees Union, our attention was drawn to two decisions of the Calcutta High Court relating to the *Bengal Club Ltd*[1], and *Royal Calcuta Golf Club*[2]. Both decisions are by a learned single Judge. They were cases of incorporated companies running clubs for profit and as business. There are, however, observations which are clearly *obiter*, that even a non-proprietary members' club in an industry. Founding itself on those observations the union contends that the club in the present case must also be treated as an industry. In fine the claim is based on the following considerations : (*a*) that the club is organised as an industry is organised on a vast scale with multifarious activities, (*b*) that facilities of accommodation, catering, sale of alcoholic and non-alcoholic beverages, games etc., are provided (*c*) that the club runs parties at which guests are freely entertained and (*d*) that the club has established reciprocal arrangements with other clubs for its members. In our opinion none of these considerations is sufficient to establish that the club is an industry within the Industrial Disputes Act.

We cannot go by the size of the club or the largeness of its membership or the number or extent of these activities. We have to consider the essential character of the Club activity in relation to the definition of industry As we said before, the definition is in two parts. The first part which we called the denotation or the meaning of the words shows what an industry really is and the second part contains the extended connotation to indicate who will be considered an integral part of the industry on the side of employees. Beginning with the second part, it may at once be conceded that the activity of the club is conducted with the aid of employees who follow callings or avocations. Therefore, if the activity of the employers is within the realm of industry, the answer must be in favour of the union But taking the first part of the definition it may also be said that the club does not follow a trade or business Its activity cannot be described as manufacture and the running of clubs is not the calling of the members or its managing committee. The only question is, is it an undertaking ?

Here the appearances are somewhat against the club. It is not of any consequence that there is no profit motive because that is considered immaterial. It is also true that the affairs of the club are organised in the way business is organised, and that there is production of material and other services and in a limited way production of material goods mainly in the catering department. But these circumstances are not truly representative in the case of the club because the services are to the members themselves for their own pleasure and amusement and the material goods are for their consumption. In other words, the club exists for its members. No doubt occasionally strangers also take benefit from its services but

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1 A.I.R. 1956 Cal 545 2 A.I.R. 1956 Cal 550.

they can only do so on invitation of members. No one outside the list of members has the advantage of these services as of right. Nor can these privileges be bought. In fact they are available only to members or through members.

If today the club were to stop entry of outsiders, no essential change in its character *vis-a-vis* the members would take place. In other words, the circumstances that guests are admitted is irrelevant to determine if the club is an industry. Even with the admission of guests being open the club remains the same, that is to say, a member's self-serving institution. No doubt the material needs or wants of a section of the community is catered for but that is not enough. This must be done as part of trade or business or as an undertaking analogous to trade or business. This element is completely missing in a members' club.

It is contended that, although there is no incorporations as such, the club has attained an existence distinct from its members. It may be said that members come and members go but the club goes on for ever. That is true in a sense. We are not concerned with members who go out. The club belongs to members for the time being on its list of members and that is what matters. Those members can deal with the club as they like. Therefore, the club is identified with its members at a given point of time. Thus it cannot be said that the club has an existence apart from the members.

It is said that the case of the club is indistinguishable from the *Hospital case*[1] That case is one which may be said to be on the verge. There are reasons to think that it took the extreme view of an industry. We need not pause to consider the *Hospital case*[1], because the case of a *members'* club is beyond even the confines established by that case. In our judgment the Madras Gymkhana Club being a members' Club is not an industry and the Tribunal was right in so declaring.

The appeal fails and is dismissed but we make no order about costs.

V. K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, S.M. SIKRI AND V. RAMASWAMI, JJ.

The State of Madras .. *Appellant**

v.

R. Nandlal & Co. .. *Respondent.*

Central Sales Tax Act (LXXIV of 1956) *(as amended by Act XXXI of* 1958), *sections* 8 (1) *and* 8 (2) (b) *and sections* 13 (1) (*d*), 13 (3) *and* 13 (4) (*e*) *and rule* 10 (1) *of the Central Sales Tax (Madras) Rules,* 1957)—*Rule* 10 (1) *applies only to dealers in the State of Madras and not to dealers outside State and therefore Proviso to rule* 10 (1) *inapplicable to purchasing dealer outside State—Competency of State authorities to provide that a single declaration covering more than one transaction shall not be made under section* 13 (3) *and* (4)—*Validity of such rule.*

A registered dealer selling goods in the course of inter-State trade or commerce of the description referred to in sub-section (3) is liable under section 8 (1) of the Central Sales Tax Act to pay tax only at the rate of one per cent. on his turnover. But to qualify himself for that rate of tax, he has to furnish to the prescribed authority a declaration duly filled and signed by the registered dealer to whom the goods are sold Such a declaration must contain the prescribed particulars in the prescribed form obtained from the prescribed authority. If the selling agent fails to furnish the declaration in the prescribed form, he is liable to pay tax at the higher rate mentioned in sub-section (2) (*b*) of section 8.

A registered dealer contemplated by rule 10 is one registered in the State where he has his place of business. The dealer has again to obtain the form of declaration

1. (1960) S.C.J. 679: (1966) 2 S.C.R. 866.

*C.A. No. 604 of 1966. 14th April, 1967.

from the assessing authority in the State of Madras. These are clear indications that the rules framed by the Madras Government were intended to apply to dealers within the State of Madras It was held that the High Court was right in holding that under the scheme of the Central Sales Tax Act and the rules framed under that Act by the State of Madras, the injunction against the purchasing dealers in rule 10 (1) did not apply to dealers in the State of Punjab.

Since rule 10 (1) requiring that a separate declaration form in respect of each individual transaction shall be furnished was intended only to apply to dealers in the State of Madras, and not to dealers outside the State, Proviso to rule 10 (1) which directs that no single declaration shall cover more than one transaction of sale except in certain cases has no application to a purchasing dealer outside the State of Madras. The rules framed by the Madras Government do not otherwise impose any binding obligation upon the selling dealer in the State of Madras to obtain a separate declaration form in respect of each sale transaction, nor do the rules visit him with a penalty on failure to comply with the requirement. It was held that it was not within the competence of the State authorities under section 13 (3) and (4) of the Central Sales Tax Act to provide that a single declaration covering more than one transaction shall not be made. Authority to prescribe such an injunction cannot have its source in section 13 (3) or section 13 (4) (*e*) ; it can only be in the authority conferred by clause (*d*) of section 13 (1) by the Central Government. The Central Government has, in exercise of the powers under section 13 (1) (*d*), prescribed the form of declaration and the particulars to be contained in the declaration. A direction that there shall be a separate declaration in respect of each individual transaction may appropriately be made in exercise of the power conferred under section 13 (1) (*d*). The State Government is undoubtedly empowered to make rules under sub-sections (3) and (4) of section 13 ; but the rules made by the State Government must not be inconsistent with the provisions of the Act and the rules made under sub-section (1) of section 13 to carry out the purposes of the Act. It the authority to make a rule prescribing that the declaration shall not contain more than one transaction can be made only under section 13 (1) (*d*), the State Government cannot exercise that authority. It was pointed out that the situation which has arisen in this case could have been avoided, if instead of each State making its rules requiring that no single declaration shall cover more than one transaction, the Central Government in exercise of the power under section 13 (1) (*d*) of the Act had made the rules.

The assumption made by the High Court that no rule was made by the State of Punjab under section 13 (4) (*e*) of the Central Sales Tax Act was held to be erroneous.

Appeal by Special Leave from the Judgment and Order dated 5th August, 1964 of the Madras High Court in Tax Case No. 131 of 1963 (Revision No. 87).

G. Ramanujam and *A. V. Rangam*, Advocates, for Appellant.

K. Srinivasan and *R. Gopalakrishnan*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—M/s. R. Nand Lal and Company—hereinafter called ' the assessee '—are dealers in wool at Vaniyambadi in North Arcot District in the State of Madras. In proceedings for assessment of sales-tax for the year 1959-60 the assessees were assessed to pay tax at the rate of seven per cent. on a turnover of Rs. 2,08,343-05 from sales effected by them to certain registered dealers in the State of Punjab. The assessing authority declined to assess the turnover at one per cent. as prescribed by section 8 (1) of the Central Sales Tax Act 1956, because in his view the assessees had submitted declarations in Form ' C ' covering two or more transactions contrary to the first proviso to rule 10 (1) of the Central Sales Tax (Madras) Rules, 1957 The Appellate Assistant Commissioner and the Sales Tax Appellate Tribunal

Madras confirmed the order of the assessing authority. The High Court of Madras, in exercise of its revisional jurisdiction, set aside the order of the Sales Tax Appellate Tribunal, and declared that the assessees were liable to pay tax on the turnover in dispute at the lower rate. The State of Madras has appealed to this Court with Special Leave.

Section 8 of the Central Sales Tax Act, 1956 (as amended by Act XXXI of 1958) in so far as it is material provided :

"(1) Every dealer, who in the course of inter-State trade or commerce—

(a) * * * *

(b) sells to a registered dealer other than the Government goods of the description referred to in sub-section (3) ;

shall be liable to pay tax under this Act, which shall be one per cent. of his turnover.

(2) The tax payable by any dealer on his turnover in so far as the turnover or any part thereof relates to the sale of goods in the course of inter-State trade or commerce not falling within sub-section (1)—

(a) * * * *

(b) in the case of goods other than declared goods, shall be calculated at the rate of seven per cent. or at the rate applicable to the sale or purchase of such goods inside the appropriate State, whichever is higher ;

(2-A) * * * *

(3) * * * *

(4) The provisions of sub-section (1) shall not apply to any sale in the course of inter-State trade or commerce unless the dealer selling the goods furnishes to the prescribed authority in the prescribed manner—

(a) a declaration duly filled and signed by the registered dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained from the prescribed authority ; or

(b) * * * *

(5) * * * *

It is common ground that the turnover was in respect of goods of the class specified in the certificate of registration of the registered dealer purchasing the goods as being intended for resale by him or for use by him in the process of manufacture of goods for sale. A registered dealer selling goods in the course of inter-State trade or commerce of the description referred to in sub-section (3) is liable under section 8 (1) of the Central Sales Tax Act to pay tax only at the rate of one per cent. on his turnover. But to qualify himself for that rate of tax, he has to furnish to the prescribed authority a declaration duly filled and signed by the registered dealer to whom the goods are sold. Such a declaration must contain the prescribed particulars in the prescribed form obtained from the prescribed authority. If the selling dealer fails to furnish the declaration in the prescribed form, he is liable to pay tax at the higher rate mentioned in sub-section (2) (b) of section 8.

The respondents did furnish declarations in Form 'C' prescribed under the Rules framed by the Central Government in exercise of the powers vested by section 13 (1) (d) of the Central Sales Tax Act But each such declaration covered more transactions of sale than one and the aggregate value of the transactions recorded in each declaration exceeded Rs. 5,000. The sales-tax authorities and the Tribunal were of the view that these declarations contravened the express direction of the rule made by the Madras State in exercise of the powers under section 13 (4) (e) of the Central Sales Tax Act The High Court held that rule 10 (1) of the Central Sales Tax (Madras) Rules, 1957, applied only to a transaction of purchase by a dealer in the State of Madras, and not to the purchasing dealer in the State of Punjab, that the Madras State was incompetent to frame rules governing the

conduct of the purchasing dealers in the Punjab ; that since the corresponding rules framed by the State of Punjab under section 13 (4) (*e*) of the Central Sales Tax Act did not include a provision requiring separate form to be used for each sale transaction, the purchasing dealers were not obliged to comply with rule 10(1) of the Madras Rules, and that since the Madras selling dealers could not compel the purchasing dealers to comply with the rules relating to furnishing of separate declaration forms ordained by the Madras Rules, the declarations were not defective. In any event the High Court held, rule 10(1) of the Madras Rules was directory and not mandatory.

The assumption made by the High Court that no rule was framed by the State of Punjab under section 13 (4) (*e*) of the Central Sales Tax Act requiring the purchasing dealers in the State of Punjab to issue a separate declaration form in respect of each individual transaction is erroneous. It is conceded before us that the Punjab Government had in purported exercise of the powers under sub-sections (3) and (4) of section 13 of the Central Sales Tax, 1956, made rule 7 (2-A) with effect from 17th February, 1958 that :

"No single declaration in Form 'C' prescribed under the Central Sales Tax (Registration and Turnover) Rules, 1957, shall cover more than one transaction of sale except when the total amount of sales does not exceed five thousand rupees."

But, for reasons which we will presently set out, the judgment of the High Court must still be affirmed.

Sub-section (4) of section 8 of the Central Sales Tax Act provides that in order to qualify himself for the lower rate of tax in respect of sales in the course of inter-State trade or commerce, the dealer selling goods has to furnish to the prescribed authority in the prescribed manner a declaration duly filled and signed by the registered dealer to whom the goods are sold The expression "prescribed authority" and "prescribed manner" mean the authority and manner prescribed by rules made under the Act. Section 13 (1) of the Central Sales Tax Act, 1956, authorises the Central Government to make rules, providing *inter alia*, the form in which and the particulars to be contained in any declaration or certificate to be given under the Act. By sub-section (3) of section 13 the State Government is authorised to make rules not inconsistent with the provisions of the Act and the rules made under sub-section (1) to carry out the purposes of the Act, and by sub-section (4) of section 13 the State Government is, in particular and without prejudice to the powers conferred by sub-section (3), authorised to make rules for all or any of the purposes set out therein including

"the authority from whom, the conditions subject to which and the fees subject to payment of which any form of declaration prescribed under sub-section (4) of section 8 may be obtained, the manner in which the form shall be kept in custody and records relating thereto maintained, the manner in which any such form may be used and any such declaration may be furnished."

In exercise of the power conferred by section 13(1)(*d*) the Central Government has prescribed the form of declaration to be furnished by the purchasing dealer under section 8 (4). That is Form 'C'. The form is in three sections—the "counterfoil", the "duplicate" and the "original". The "original" contains at the foot of the Form the following Note :—

"(To be furnished to the prescribed authority in accordance with the rules framed under section 13 (4) (*e*) by the appropriate State Government.)"

The Madras State Government presuming to act in exercise of authority under section 13 (3) and section 13 (4) (*e*) framed the Central Sales Tax (Madras) Rules, 1957, rule 10 (1) of which reads as follows :—

"A registered dealer, who wishes to purchase goods from another such dealer on payment of tax at the rate applicable under the Act to sales of goods by one registered dealer to another, for the purpose specified in the purchasing dealer's certificate of registration, shall obtain from the assessing authority in the City

of Madras and the registering authority at other places a blank declaration form prescribed under rule 12 of the Central Sales Tax (Registration and Turnover) Rules, 1957 for furnishing it to the selling dealer. Before furnishing the declaration to the selling dealer, the purchasing dealer or any responsible person authorized by him in this behalf shall fill in all the required particulars in the form and shall also affix his usual signature in the space provided in the form for this purpose. Thereafter, the counterfoil of the form shall be retained by the purchasing dealer and the other two portions marked "original" and "duplicate" shall be made over by him to the selling dealer:

Provided that no single declaration shall cover more than one transaction of sale except—

(a) in cases where the total amount covered by one declaration is equal to or less than Rs. 5,000 or such other amount as the State Government may, by a general order, notify in the *Fort St. George Gazette*, and

(b) * * * *"

Ex facie, this rule imposes no obligation upon a dealer in the State of Madras wishing *to sell* goods it applies to a dealer wishing to *purchase* goods from another dealer. The argument that clause (1) of rule 10 is intended to apply to a registered dealer in the State of Punjab is negatived by the scheme of the Central Sales Tax Act and the Rules framed thereunder. By section 7 of the Central Sales Tax Act, every dealer liable to pay tax under the Act has to make an application for registration under the Act to such authority in the appropriate State as the Central Government may by general order specify. The authority to be specified is designated in the Central Sales Tax (Registration and Turnover) Rules, 1957, framed by the Central Government under section 13 (1), the "notified authority": *vide* rule 2 (*c*). Rule 3 provides that an application for registration under section 7 shall be made by a dealer to the notified authority in Form 'A'. In exercise of the powers conferred by sub-section (1) of section 7 of the Central Sales Tax Act, 1956, the Central Government issued a notification No. S.R.O. 643, dated 22nd February, 1957, specifying the persons mentioned in column (3) of the Schedule thereto as the authorities to whom the dealers of the description in column (2) shall make the application for registration. Item 1 of the Schedule requires a dealer having a single place of business in a State to make an application to the authority competent to register him under the general sales tax law of the State if he were liable to be so registered and item 2 provides that the dealer having more than one place of business in a State shall make an application to the authority competent to register him in respect of the principal place of business under the general sales tax law of the State if he were liable to be so registered. A registered dealer contemplated by rule 10 is therefore registered in the State where he has his place of business. The expression "assessing authority" is defined in the Central Sales Tax (Madras) Rules, 1957, as meaning any person authorized by the State Government to make any assessment under the Madras General Sales Tax Act, 1959 (Madras Act I of 1959). The dealer has again to obtain the form of declaration from the assessing authority in the State of Madras. These are clear indications that the rules framed by the Madras Government were intended to apply to dealers within the State of Madras. The High Court was, in our judgment right in holding that under the scheme of the Central Sales Tax Act and the Rules framed under that Act by the State of Madras, the injunction against the purchasing dealers in rule 10 (1) did not apply to dealers in the State of Punjab. It is unnecessary on that view to express any opinion on the question whether the State Government could, in exercise of the powers under section 13 (4), impose upon dealers not within the State, obligations to comply with conditions relating to the contents of the 'C' Form declarations.

Since rule 10 (1) requiring that a separate declaration form in respect of each individual transaction shall be furnished was intended only to apply to dealers in the State of Madras, and not to dealers outside the State, proviso to rule 10 (1) which directs that no single declaration shall cover more than one transaction of sale except

in certain cases has no application to a purchasing dealer outside the State of Madras. Rule 10 (2) provides:

> "A registered dealer who claims to have made a sale to another registered dealer shall, in respect of such claim attach to his return in Form I the portion marked "original" of the declaration received by him from the purchasing dealer. The assessing authority may, in its discretion, also direct the selling dealer to produce for inspection the portion of the declaration marked "duplicate".

But this rule does not direct that a declaration covering more than one transaction of sale shall not be given. The rules framed by the Madras Government do not otherwise impose any binding obligation upon the selling dealer in the State of Madras to obtain a separate declaration form in respect of each sale transaction, nor do the rules visit him with a penalty on failure to comply with the requirement.

We are constrained to observe that the rule-making authorities have failed to appreciate the scheme of section 13 of the Central Sales Tax Act. We are of the opinion that it was not within the competence of the State authorities under section 13 (3) and (4) of the Central Sales Tax Act to provide that a single declaration covering more than one transaction shall not be made. Authority to prescribe such an injunction cannot have its source in section 13 (3) or section 13 (4) (*e*): it can only be in the authority conferred by clause (d) of section 13 (1) by the Central Government. The Central Government has, in exercise of the power under section 13 (1) (*d*), prescribed the form of declaration and the particulars to be contained in the declaration. A direction that there shall be a separate declaration in respect of each individual transaction may appropriately be made in exercise of the power conferred under section 13 (1) (*d*). The State Governmnet is undoubtedly empowered to make rules under sub-sections (3) and (4) of section 13: but the rules made by the State Government must not be inconsistent with the provisions of the Act and the rules made under sub-section (1) of section 13 to carry out the purposes of the Act. If the authority to make a rule prescribing that the declaration shall not contain more than one transaction can be made only under section 13 (1) (d), the State Government cannot exercise that authority. The situation which has arisen in this case could have been avoided, if instead of each State making its rules requiring that no single declaration shall cover more than one transaction, the Central Government in exercise of the power under section 13 (1) (*d*) of the Act had made the rules.

The appeal fails and is dismissed with costs.

S.V.J. — *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—M. HIDAYATULLH AND C. A. VAIDIALINGAM, JJ.

Syndicate Bank Ltd. .. *Appellant**

v.

K. Ramanath V. Bhat .. *Respondent.*

Industrial Disputes Act (XIV of 1947), section 33 and the proviso to section 33 (2) (b)—Interpretation—The order of dismissal—The point of time of passing such order—The order referred to is the order which comes into effect immediately—No question of the appellate authority, the working committee of Directors, passing an order of dismissal.

The qustion for determination is whether it can be stated that the respondent was dismissed by the order of 12th November, 1963, of the Managing Director or by the appellate order of 20th March, 1964, passed by the working committee of Directors, in order to find out any contravention of section 3 of the Industrial Disputes Act (XIV of 1947).

* C A No 503 of 1966. 22nd August, 1967.

Held A reading of the material provisions of section 33 show that the expressions used are 'discharge or punish, whether by dismissal or otherwise', and they clearly indicate the point of time, when the order of discharge or dismissal is passed, by the authority concerned An order of discharge or dismissal can be passed only once; and in this case, the order of dismisssal is the one passed, by the Managing Director, on 12th November, 1963 No doubt, either by virtue of the Standing Orders, or by virtue of a contract of service, a right of appeal may be given to a workman concerned to challenge an order of dismissal But the appellate authority only considers whether the order of dismissal has to be sustained or whether it requires modification. Therefore, there is no question of the appellate authority passing, again, an order of dismissal. Further, the proviso to section 33 (2) (*b*), when it refers to payment of wages for one month, also indicates that it relates to an order of discharge or dismissal, which comes into effect immediately, which (in this case) is the order passed on 12th November, 1963.

Appeal by Special Leave from the Award, dated the 10th November, 1964 of the Industrial Tribunal, Andhra Pradesh in Misc. Petition No. 32 of 1964 in Industrial Dispute No. 4 of 1964.

H. R. Gokhale, Senior Advocate (*B.K. Seshu, P. Parameshwara Rao, Mrs. Jyotana R. Melkote* and *R. V. Pillai*, Advocates, with him), for Appellant.

M. K. Ramamurthi, Mrs. Shyamala Pappu and *Vineet Kumar*, Advocates for *M/s. Ramamurthi & Co.*, for Respondent.

The Judgment of the Court was delivered by

Vaidialingam, J.—This appeal, by Special Leave, is directed against the award, dated 10th November, 1964, of the Industrial Tribunal, Andhra Pradesh, Hyderabad accepting a complaint filed by the respondent, under section 33-A of the Industrial Disputes Act (XIV of 1947), (hereinafter called the Act).

The respondent was at the material time working in the main branch of the appellant, at Belgaum. By order dated 8th March, 1963, the respondent was transferred to Bhatkal branch, as a 'C' Rank Officer, to work there, as an accountant. He was also informed that he was being relieved, so as to enable him to proceed to duty, at the place of transfer, by 18th March, 1963 He was allowed three days' joining time.

On 13th March, 1963, the Manager of the Branch at Belgaum, informed the respondent that he was relieved, with effect from that date, to join duty at the Bhatkal branch, by 18th March, 1963 The respondent, by letter dated 14th March 1963, after setting out the various matters therein, applied for privilege leave, for ninety days, from 14th March, 1963 to 11th June, 1963, so as to enable him to improve his health and also to attend to certain domestic matters. But the Bank, the appellant herein, desired him, by their letter dated 23rd March, 1963, to joint duty and then apply for leave, if necessary. So further correspondence ensued, between the Bank and the respondent, the respondent again making a request for sanction of his leave and the appellant Bank insisting upon his joining duty, according to the order of transfer, and then applying for leave. But, as the respondent did not join duty at the Bhatkal branch, though he was relieved from the Belgaum office, the appellant, by their communication, dated 23rd July, 1963, desired the respondent to offer explanation for not obeying the order of transfer. The respondent sent a reply, on 29th July, 1963, stating what, according to him, were the reasons for his not joining duty at the transferred office. The appellant Bank, not satisfied with the explanation, given by the respondent, framed two charges against him, and communicated the same, on 7th August, 1963. The charges were to the effect that (*a*) the respondent, by wilfully disobeying the lawful and reasonable transfer order of the management, has committed gross misconduct, for which the punishment is dismissal from service; and (*b*) the respondent had absented himself from duty from 14th March, 1963, without leave, which again, is a minor misconduct for which also punishment can be imposed. The respondent was also directed to submit

his explanation, if any, to the charges, on or before 25th August, 1963. The respondent offered his explanation to the charges, by his letter, dated 21st August, 1963 The appellant informed the respondent on 1st October, 1963, that an enquiry would be conducted against him, in respect of the charges, on 5th October, 1963, and desired him to be present at the enquiry, with the necessary evidence, in support of his defence.

The inquiry was conducted by the Enquiry Officer, in which the respondent participated. The Enquiry Officer sent a report to the Managing Director of the Bank, dated 28th October, 1963, substantially finding the respondent guilty of both the charges. In respect of the first charge of gross misconduct, for wilfully disobeying the order of transfer, the Enquiry Officer had proposed that the respondent should be dismissed and, in respect of the second charge, of absenting without leave, it was proposed in the report that the increment be stopped, for a period of six months, with effect from 25th April, 1963. Certain consequential proposals were also made, as to how exactly the respondent's absence, was to be dealt with.

The Managing Director of the Bank, after considering the report submitted by the Enquiry Officer, as well as the further explanation, offered by the respondent, in respect of the findings recorded in the said report, by his order dated 12th November, 1963, agreed with the recommendation of the Enquiry Officer, dismissed the respondent from the service of the Bank with immediate effect, for the offence of wilful disobedience of the order of transfer. The respondent was also informed that he might appeal, against the order of dismissal, to the working committee of the Directors of the Bank, within forty-five days of receipt of the order.

The respondent filed an appeal, on 17th December, 1963, before the working committee of the Directors, wherein he attacked the various proceedings, culminating in the order of dismissal, passed against him Intimation of the hearing of the appeal was given to the respondent But, it is seen that on the date when the appeal was taken up for hearing *viz.*, 20th March, 1964, the respondent was not present either in person or through authorised representative of his In consequence, the working committee of the Directors dismissed the appeal on 20th March, 1964. In the appellate order, the working committee has elaborately considered the various circumstances necessitating the conduct of the enquiry, the enquiry proceedings and the answers given by the respondent, and it has, ultimately, agreed with the findings recorded in the enquiry proceedings that the respondent had wilfully disobeyed the lawful orders of the management transferring him. The result was that the order of dismissal, passed by the Managing Director on 12th November, 1963, was confirmed.

At this stage it may be mentioned that the Central Government had referred, on 8th January, 1964, for adjudication, to the Industrial Tribunal, of which Dr. Mir Siadat Ali Khan was appointed as the presiding officer, with headquarters at Hyderabad, the question as to whether action, by the appellant-Bank, in discontinuing Pigmy collection and payment thereof to the workmen, was justified. This was numbered as I.D. No. 4 of 1964, and the award, in this dispute, was given on 26th August, 1964, and the Central Government published the same, in the Gazette of India, on 7th September, 1964.

The respondent filed a complaint, under section 33-A of the Act, on 4th June, 1964, before the Central Government Industrial Tribunal, at Hyderabad, attacking the enquiry proceedings, conducted against him, and the order of dismissal, passed by the appellant Apart from attacking the inquiry proceedings, on merits, as *mala fide*, the respondent contended that the order of dismissal had been passed against him, without the appellant-Bank complying with the provisions of the proviso to section 33 (2) (*b*), of the Act According to him, inasmuch as the order of dismissal had been passed, during the pendency of I.D. No. 4 of 1964, the management should have asked the Industrial Tribunal for approval of their action, and they should have paid him one month's wages. Therefore, inasmuch as these things were not done, the appellants have contravened the provisions of section 33 of the Act.

The appellant-Bank, in their counter-statement, pleaded that the domestic enquiry, conducted by the management, was very fair and that the action of the management, in dismissing the respondent, was perfectly justified. In this connection, the appellant raised the contention that the respondent was not a 'workman,' and that, in any event, he was not a workman concerned with the dispute covered by I.D. No 4 of 1964, and therefore he was not entitled to file an application, under section 33-A. They further contended that there was no contravention of section 33 of the Act, because, at the time when the order dismissing the respondent was passed on 12th November, 1963, there was no industrial dispute pending, so as to make it obligatory on the part of the appellant, to take action, in accordance with the proviso to section 33 (2) (*b*) of the Act.

The Industrial Tribunal, by its order, under attack, has over-ruled all the objections, raised by the management. The Tribunal has held that the respondent was a 'workman' and that he was also a workman concerned in I.D No. 4 of 1964, and therefore he was competent to file an application, under section 33-A. The Tribunal has also held that the dismissal of the respondent became effective only on 20th March, 1964, when the working committee of the Directors of the appellant-Bank disposed of the appeal, filed by the respondent. As this date fell within the period, between 8th January, 1964 and 8th October, 1964 (during which I.D. No. 4 of 1964 was pending), the management was bound to comply with the proviso to section 33 (2) (*b*) of the Act. As this proviso had not been complied with, the Tribunal held that there was a contravention of the provisions of section 33 of the Act, which gives a right to the respondent to invoke the jurisdiction of the Tribunal, under section 33-A of the Act.

After having held that there is a contravention, of section 33 of the Act, the Tribunal then considered the attack levelled, as against the domestic enquiry proceedings, by the respondent and recorded a finding to the effect that it was not fair to consider that the respondent had wilfully disobeyed the order of transfer, passed by the management. The Tribunal, therefore, held, on both the findings, that the respondent should be re-instated, with continuity of service and back wages.

The same contentions, that were raised before the Industrial Tribunal, on behalf of the management, have been urged before us, by the appellant's learned Counsel, Mr. Gokhale. Counsel urged that the respondent is not a 'workman' and, in any event, he is not a workman concerned with the dispute in I D No 4 of 1964. Counsel further pointed out that even assuming that the findings of the Tribunal, recorded against the appellant, were correct, the application, under section 33-A, was not maintainable, inasmuch as there was no contravention, by the management, of any of the provisions of section 33, of the Act. In this connection, Counsel pointed out, that the order of dismissal, having been passed by the Managing Director, on 12th November, 1963, long before 8th January, 1964, the date when I.D. No. 4 of 1964, was referred, there was no obligation, on the part of the management, to ask for approval of the Tribunal, in respect of their action, or of paying one month's wages to the respondent. Counsel also urged that even if those questions were answered against the appellant, the award would have to be set aside because the Industrial Tribunal had really constituted istelf as a Court of Appeal, when it set aside the order of dismissal, passed by the management, which was based on the findings recorded in a proper domestic enquiry.

Mr. M. K Ramamurthy, learned Counsel, appearing for the respondent, has supported the views, expressed by the Tribunal, on all aspects.

If the contention of the appellant, that there was no Industrial dispute, pending at the time when the order of dismissal was passed, is accepted, then, quite naturally, it follows that no question of contravention of section 33, of the Act, arises, in which case, the complaint, under section 33-A, is not maintainable, in law. In an enquiry, under section 33-A, the first question that the Tribunal will have to consider, is regarding the contravention, by the employer, of the provisions of section 33 of the Act. If this issue is answered against the employee, nothing further can be done,

under section 33-A, of the Act. This position has been settled, by the decisions of this Court, in *Equitable Coal Ltd* v *Algu Singh*[1], and *The Punjab National Bank Ltd* v. *Its Workmen*[2]. After hearing arguments, on this aspect, we are inclined, in the instant case to accept the contention of the appellant, in this regard and hence, no other questions arise, in the application filed, by the respondent under section 33-A of the Act.

There is no controversy in this case, that the appellant did not seek the approval of the Industrial Tribunal concerned, nor did they offer or pay one month's wages to the respondent. There is also no controversy that I.D No. 4 of 1964, can in law be considered to be pending only from 8th January, 1964 to 8th October, 1964. The order of the Managing Director dismissing the respondent from service, was made on 12th November, 1963 which date, admittedly falls outside the duration of the pendency of I.D. No. 4 of 1964. The order of the working committee of Directors, rejecting the respondent's appeal, which was passed on 20th March, 1964, certainly falls within the period when I.D. No. 4 of 1964 was pending. Therefore, the question that arises for consideration, in this case is as to when, it can be stated that the respondent was dismissed, *i.e.*, by the order of 12th November 1963, of the Managing Director, or by the appellate order of 20th March, 1964, passed by the working committee of Directors According to the appellant, the order which has to be taken into account, for considering whether there is a contravention of section 33 of the Act, is the original order passed, by the Managing Director, on 12th November, 1963, whereas according to the respondent, the appellate order, passed on 20th March, 1964, is the effective order, dismissing him.

The respondent's contention, in this regard, is briefly as follows. Under the National Industrial Tribunal (Bank Disputes) Award, 1962 (known as the Desai Award), a workman, in such cases, has got a right of appeal, to the appropriate authority, and he has got a period of 45 days, for filing the appeal. In this case, the order of the Managing Director, dated 12th November, 1963, also states that the respondent is entitled to file an appeal, against that order, to the working committee of the Directors, within 45 days, of receipt of that order. The respondent, admittedly, filed an appeal, on 17th December, 1963, well within the time. The appeal was disposed of, on 20th March, 1964. The language of section 33 (2), counsel points out, is to the effect that the employer has been enabled to take action, 'in accordance with the standing orders applicable to a workman concerned, in such dispute.' Inasmuch as the standing orders, in this case, give a right to appeal, to the workman, any order that is passed, by the management, in respect of which a right of appeal is given to a workman, cannot be considered to be an effective or operative order till the appellate decision is made known. It will be open to the appellant to take action, in accordance with the proviso to section 33 (2) (*b*), at the time when the appellate order was passed, on 20th March, 1964, as the appellate order is the effective and binding order. So far as the parties are concerned, the order of dismissal, in this case, must be considered to have been passed only on 20th March, 1964, which date squarely falls within the period, during which I.D. No. 4 of 1964, was pending. We are not inclined to accept the contentions of the learned Counsel, for the respondent, in this regard.

In has been laid down, by this Court, in *Strawboard Manufacturing Co.* v. *Gobind*[3], in construing the proviso to section 33 (2) (*b*) of the Act, that the three things contemplated, *viz.*, dismissal or discharge, payment of the wages and making of the application, should be part of the same transaction. Therefore, in our view, there must be a fixed and certain point of time which will be applicable to all managements and workmen, when construing the provisions of section 33 of the Act. The management must definitely know, as to when they have to take the

1 (1958) 1 L.L.J. 793 : A.I R 1958 S C. 761.
2. (1960) S.C J. 999 : (1960) 1 S C R 806.
3. (1962) 3 S.C R. (Supp.) 618, 630 . A.I.R. 1962 S C 1500.

necessary action, under the proviso to section 33 (2) (*b*), and the workman also should likewise, know the definite time when the management should have complied with the requirements of the proviso to section 33 (2) (*b*), so that he could approach the Industrial Tribunal, by way of a complaint, under section 33-A, of the Act. A reading of the material provisions of section 33 shows that the expressions used are 'discharge or punish, whether by dismissal or otherwise,' and they clearly indicate, in our opinion, the point of time, when the order of discharge or dimisssal is passed, by the authority concerned. An order of discharge or dismissal, in our opinion, can be passed only once ; and, in this case, the order of dismissal is the one passed, by the Managing Director, on 12th November, 1963. No doubt, either by virtue of the Standing Orders, or by virtue of a contract, of service, a right of appeal may be given to a workman concerned, to challenge an order of dismissal. But the appellate authority only considers whether the order of dismissal has to be sustained, or whether it requires modification. Therefore, there is no question of the appellate authority passing, against, an order of dismissal. We are not concerned, in construing the provisions of section 33, as to the finality of the orders passed, by the authority concerned, in the first instance, in passing orders of dismissal or discharge. Further, the proviso to section 33 (2) (*b*), when it refers to payment of wages for one month, also indicates that it relates to an order of discharge or dismissal, which comes into effect immediately, which, in this case, is the order passed, on 12th November, 1963. The payment of one month's salary or wages, is to soften the rigour of unemployment that will face the workman, against whom an order of discharge or dismissal, has been passed. If the management has to wait for the minimum period prescribed for filing an appeal, and also await the termination of the appeal when one is filed, considerable time would have lapsed from the date of the original order, during which period the workman would not have received any salary. It will be anomalous to hold that even after the lapse of such a long time, the payment of one month's salary would satisfy the requirements of the section.

In this case, if the contention of the respondent is accepted, it will lead to very anomalous results, and the time when a management has to comply with the proviso to section 33 (2) (*b*), will radically differ. For example, according to the respondent, the management, in this case, will have to wait for the minimum period of 45 days, which is the time given for the respondent, to file an appeal. If an appeal is filed, according to the respondent, the management will have to wait further, and await the disposal of the appeal. That means, in such a case, the proviso will come into effiect only at the time when the appeal is disposed of. On the other hand, if, after the expiry of 45 days, the workman concerned does not file an appeal, the management, according to the respondent, will have to comply with the proviso immediately after the period of limitation is over. That is, the point of time when the proviso to section 33 (2) (*b*) will have to be complied with, by the management will depend upon the filing or non-filing of an appeal, by the workman concerned. Further, if at the time, when the original order of dismissal is passed, there is no dispute pending, and when the appeal against the order of dismissal is pending, a Dispute is referred for adjudication, it will be open to the management to prolong its decision, in the appeal, till after the Industrial dispute has come to an end. It cannot be the intention of the Legislature that such variable and indeterminate periods are contemplated in construing the proviso to section 33 (2) (*b*). The natural and reasonable interpretation, to be placed on section 33, is, in our opinion, that the order of discharge or dismissal, is the original or the very first order passed by the management; which in this case is the one passed, by the Managing Director, on 12th November, 1963. It follows that on that date, I.D. No. 4 of 1964, had not even been referred, for adjudication, which, as we have already indicated, was by an order of Government, dated 8th January, 1964. Hence there is no contravention of section 33, in this case.

Before we close the discussion, it is necessary to state that Mr. Ramamurthy, earned Counsel for the respondent, referred us to two decisions of this Court,

in *The Management of Hotel Imperial* v. *Hotel Workers' Union*[1], and *Collector of Customs, Calcutta* v. *East India Commercial Co. Ltd*[2] In the first decision, this Court has recognised that a term should be implied, by Industrial Tribunals, in the contract of employment, that, if the master has held a proper enquiry and come to the conclusion that the servant should be dismissed, and, in consequence, suspends him, pending the permission, required under section 33 of the Act, he has the power to order suspension, thus supending the contract of employment temporarily, so that there is no obligation on him to pay wages, and no obligation on the servant, to work In the second decision, this Court held that in cases where an appellate authority reverses the order under appeal, or modifies the order or merely dismisses the appeal and thus confirms the order appealed against without any modification, the operative order is the order of the appellate authority In our opinion, these decisions do not assist the respondent and the principles laid down therein, have no bearing on the point to be determined in the instant case.

The result is that the award of the Industrial Tribunal is set aside and the application, filed by the respondent before it, will stand dismissed The appeal is, accordingly, allowed, but without costs

V M.K. ——— *Appeal allowed*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—M. HIDAYATULLAH AND C A. VAIDIALINGAM, JJ

The Employers of Firestone Tyre and Rubber Co, (P) Ltd .. *Appellant**

v.

The Workmen .. *Repondents.*

Domestic Enquiry—The delinquent employee given the opportunity to defend himself at al stages—No disadvantage to the delinquent employee—Adoption of the procedure of examining the delinquent first—If offencds the principles of natural justice.

One *S*, a van driver of the Appellant-company took delivery of the tyres and signed the six invoices. He set out with one *D* (packer) by his side in the driver's cabin After sometime, *S* telephoned to the officee of the Company that two tyres from two invoices were short. He was asked to return at once. On his return the tyres with him were unloaded and counted. By way of an immediate check the tyres held in stock were also counted There was no excess in stock. The tyres in the van were short by two. *S* maintained that no tyres were lost or stolen on the way. He was supported by *D*. The case of *S* was that the tyres were short-loaded. After investigation, (verification of stock on hand and the invoices) a charge-sheet, charging him of theft, fraud or dishonesty, in connection with the employer's business, or property, was served on him. After giving him an opportunity to defend and after having gone through the various stages of enquiry, the charge was found proved and he was dismissed from service. *S* insisted on his version being heard before the charge was framed.

Held :The enquiring officer afforded every opportunity to *S* to controvert the charge or prove his case. *S* was informed of the charge very clearly, the witnesses were examined in his presence and he was allowed to cross-examine them fully. A true record was kept He was given an opportunity to lead evidence, and the enquiry officer and the Manager gave him a full chance to explain, after apprising

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1. (1960) S C J 317 (1960) M L J. (Crl) 568 207 : (1960) 1 S C R 476

2. (1963) 2 S C J. 230 . (1963) 2 S C R 563.

* C.A. No 515 of 1966. 22nd August, 1967.

him in detail of the findings tentatively reached. The evidence of *S* and *D* taken together excludes the possibility of loading of 8 tyres. The enquiring officer and the Manager relied upon the evidence of those who loaded the tyres supported as it was by the admission several times repeated by *S* that he had checked the tyres at the time of loading. In other words, the Management refused to believe *S* even though he was supported by *D*. This, the Management was entirely within its right in doing and the Tribunal was in error in exercising appellate powers by coming to a different conclusion. When the accusation is based on record, the delinquent may be examined first for any explanation he may offer.

Held also, that the procedure of examining the delinquent first may be adopted in a clear case only.

Appeal by Special Leave from the Award, dated the 23rd November, 1964 of the Labour Court, Andhra Pradesh in Industrial Dispute No. 5 of 1964.

S. V. Gupte, Solicitor-General of India (*Rameshwar Nath, Mohinder Narain* and *P. L. Vohra*, Advocates of *M/s. Rajinder Narain & Co.*, with him), for Appellant.

B. R. Dolia, E. C. Agarwala and *P. C. Agrawala*, Advocates for Respondents.

The Judgment of the Court was delivered by

Hidayatullah, J.—The present appeal arises from the award of the Presiding Officer, Labour Court, Andhra Pradesh, Hyderabad, by which the dismissal of one Subramaniam, van driver in the employ of the Firestone Tyre & Rubber Co. (P) Ltd., after a domestic enquiry was set aside and the Company was ordered to reinstate him but not to pay him his back wages. The Reference in which thist decision was rendered was made by the Government of Andhra Pradesh on 7th February, 1964. The following are the circumstances leading up to it.

Subramaniam was a van driver with the Firestone Tyre & Rubber Co. from 1953. One of his duties as a van driver was the transportation for delivery of the products of the Company. On 18th June, 1963, Subramaniam set out to deliver tyres covered by six invoices to diverse addresses. Two of the invoices (Nos. 13815 and 13816) were concerned with eight tyres (4 tyres per invoice) of the specification 8.25×20 Tran. H.D.Nyl. 12-PR. Subramaniam took delivery of the tyres and signed the six invoices. After locking the tyres in his van with a key which he claims never left his possession, he set out with one M. V. Das (packer/scooter driver) by his side in the driver's cabin. This was soon after the lunch break. At about 3-15 P.M. Subramaniam telephoned to the office of the Company that two tyres from the two invoices were short. He was asked to return at once. On his return the tyres with him were unloaded and counted. By way of an immediate check the tyres held in stock were also counted. There was no excess in stock The tyres in the van were short by two Subramaniam maintained that no tyres were lost or stolen on the way. His case was that the tyres were short-loaded. After investigation, a charge-sheet was served on him for the following act of misconduct :—

"Theft, fraud or dishonesty in connection with the employer's business of property".

The charge-sheet gave full details and fixed the time and place of an enquiry to be held against him, and further informed him that he could defend himself through a workman, produce evidence or cross-examine the witnesses. He was suspended pending the result of the enquiry. The enquiry was held by Mr. R M Coyajee, Industrial Relations Officer. Four witnesses for the company and two for Subramaniam were examined. The Company filed 20 documents and Subramaniam filed 2 documents.

Mr. Coyajee found the charge proved and submitted the minutes of the enquiry to the Superior officer. Then the Manager, Southern Division informed Subramaniam that he was convinced of the latter's guilt and that he had tentatively

decided to dismiss him He asked Subramaniam to show cause, if any, against the decision Subramaniam showed cause but the Manager ordered his dismissal.

The Tyre and Rubber Company's Employees Union having raised a dispute the matter was referred to the Tribunal :

> "(*a*) whether the dismissal of Shri K. Subramaniam, van driver by the employers of Firestone Tyre & Rubber Co (P), Ltd., Hyderabad, is justified?
>
> (*b*) If not, to what relief is he entitled?

Before the Tribunal the Union contended that the enquiry was opposed to the principles of natural justice and the conclusion was perverse. The Tribunal held that the enquiry was not held properly and the conclusion arrived at the domestic enquiry was perverse. The Tribunal rejected the evidence and on the basis of evidence recorded by it, held that the charge was not proved.

The Tribunal gave several reasons for its conclusion that the enquiry was not properly conducted. These were :

> (*a*) that the inquiry was held immediately after the investigation without taking the explanation of the workman;
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> (*b*) The workman was examined and cross-examined even before the evidence against him was recorded;
>
> (*c*) Copies of the statements of witnesses examined at the preliminary enquiry were not supplied to the workman;
>
> (*d*) Copies of the minutes of the inquiry were not given to the workman before asking him to reply to the show cause notice; and
>
> (*e*) the evidence of Das which cleared the workman was not properly considered.

The Tribunal did not rely upon the record of the enquiry and on the basis of evidence recorded by itself, held that the fault of the workman was not established and that his dismissal was wrong, with the result already indicated.

The Company now contends that none of these grounds has any validity. It has tried to meet each of the ground and in our opinion successfully. We shall take these grounds one by one and indicate the submissions which in our opinion must be allowed to prevail. As regards ground No. (*a*) it is clear to us that, although it may be desirable to call for such an explanation before serving a charge-sheet, there is no principle which compels such a course. The calling for an explanation can only be with a view to making an enquiry unnecessary, where the explanation is good but in many cases it would be open to the criticism that the defence of the workman was being fished out. If after a preliminary enquiry there is *prima facie* reason to think that the workman was at fault, a charge-sheet setting out the details of the allegations and the likely evidence, may be issued without offending against any principle of justice and fairplay. This is what was done here and we do not think that there was any disadvantage to the workman. The management has pointed out that even on fact the view is not correct. They have referred to the workman's letter dated 30th May, 1963 in which he reiterated that he was supplied a shorter number of tyres than that given in the invoices and to his statement before Mr. Coyajee that he would state his case fully. In these circumstances, it is hardly possible to say that the workman was at a disadvantage in any way.

We may leave for the present ground No. (*b*) and proceed to consider the others. Ground No. (*c*) was not a ground of complaint before the Tribunal This ground was made out by the Tribunal In fact these statements were not included in the record of the enquiry Nor were they made the basis of any conclusion. As to ground No (*d*) it is sufficient to say that the minutes were hardly needed as the workman was present personally and had conducted the defence. If he needed to read he record he could have easily asked for an inspection and we have no doubt in our

mind that he would have been given such an inspection The minutes show an utmost consideration at all stages of the need for a proper defence The Tribunal equated the domestic enquiry to enquiries under Article 311 of the Constitution which was hardly proper

It seems to us that the enquiring officer afforded every opportunity to Subramaniam to controvert or prove his case. Subramaniam was informed of the charge very clearly, the witnesses were examined in his presence and he was allowed to cross-examine them fully. A true record was kept He was given an opportunity to lead evidence and the enquiry officer and the manager gave him a full chance to explain, after apprising him in detail of the findings tentatively reached. The evidence of Das was not dealt with in detail but as Das was not concerned with the loading operation and his evidence was not apparently accepted that Subramaniam had not removed the tyres. Das was apparently taken to support Subramaniam's claim that the tyres were not loaded at all, a conclusion not reached by the management on evidence.

This leaves over the contention that before examining the witnesses Subramaniam was subjected to a cross-examination. This was said to offend the principles of natural justice and reliance was placed on *Tata Oil Mills Company Ltd* v. *Its Workmen and another*[1], *Sir Enamel & Stamping Works Ltd* v *Their Workmen*[2], *Meenglas Tea Estate* v *Its Workmen*[3], and *Associated Cement Companies, Ltd* v *Their Workmen & another*[4] These cases no doubt lay down that before a delinquent is asked anything, all the evidence against him must be led. This cannot be an invariable rule in all cases. The situation is different where the accusation is based on a matter of record or the facts are admitted In such a case it may be permissible to draw the attention of the delinquent to the evidence on the record which goes against him and which if he cannot satisfactorily explain must lead to a conclusion of guilt. In certain cases it may even be fair to the delinquent to take his version first so that the enquiry may cover the point of difference and the witnesses may be questioned properly on the aspect of the case suggested by him It is all a question of justice and fairplay. If the second procedure leads to a just decision of the disputed points and is fairer to the delinquent than the ordinary procedure of examining evidence against him first, no exception can be taken to it. It is, however, wise to ask the delinquent whether he would like to make a statement first or wait till the evidence is over but the failure to question him in this way does not *ipso facto* vitiate the enquiry unless prejudice is caused. It is only when the persons enquired against seems to have been held at a disadvantage or has objected to such a course that the enquiry may be said to be vitiated It must, however, be emphasised that in all cases in which the facts in controversy are disputed the procedure ordinarily to be followed is the one laid down by this Court in the cited cases. The procedure of examining the delinquent first may be adopted in a clear case only. As illustration we may mention one such case which was recently before us There a bank clerk had allowed overdrafts to customers much beyond the limits sanctioned by the bank The clerk had no authority to do so. Before the enquiry commenced he admitted his fault and asked to be excused He was questioned first to find out if there were any extenuating circumstances before the formal evidence was led to complete the picture of his guilt We held that the enquiry did not offend any principles of natural justice and was proper (See *The Central Bank of India Ltd* v. *Karunamoy Baneerjee*[5].

In the present case Subramaniam had complained earlier that his version ought to have been elicited first before enquiry against him was ordered This is exactly what was done by the enquiring officer. We had the whole of Subramaniam's statement read to us and found nothing which we can say was unfair The enquir-

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1 (1963) 2 L L J 78 (1963) 6 F L R 257
2 (1963) 2 L L J 367 (1964) 3 S C R 616 (1965) 1 S C J 334
3 (1963) 2 L L J 392 (1964) 1 S C J 98.
4 (1963) 2 L L J 396 (1964) 3 S C R 652.
5 32 F J R 481 A I R 1968 S C 266

ing officer gave him an interpreter after ascertaining if he had any objection to the person selected, asked him to reply in English or Telugu as he preferred, invited him to call some workman to assist him, asked him the names of the witnesses he wished to examine and whether he wanted any further time for the preparation of his defence. He was then questioned about the loading of tyres in his van, the invoices he had signed and whether he had checked the tyres loaded He was next asked what route he had followed, whether there was a chance of pilferage *en route* and whether he suspected any person of having interfered with the van. He was also asked if he was present when the stock was checked. He denied certain details of this stock taking The issue was thus narrowed to the fact whether 8 tyres were loaded or 6, it being the case of the Company that 8 tyres were loaded and that of Subramaniam that only 6 tyres were loaded, but his receipt for 8 tyres was obtained. The witnesses who loaded the tyres were then called and were examined searchingly by the Presiding Officer and cross-examined by Subramaniam No doubt some of the questions appeared to be leading but they were respecting the matter of record and too much legalism cannot be expected from domestic enquiry of this character. The officer asked Subramaniam again and again whether he was defending himself properly or not and Subramaniam always expressed his satisfaction.

In these circumstances, we do not see how the enquiry can be said to have offended any principle of natural justice at all The Tribunal mechanically applied the dicta of this Court without noticing that the facts here were entirely different from those in the cited cases and the observations covered those cases where all or most of the facts were contested and could not be made applicable to csaes where a greater part of the evidence was a matter of written record and the difference was narrow We are, therefore, of the opinion that the enquiry was properly conducted. As to the evidence of Das it is obvious that Das was supporting Subramaniam in his statement that no tyres were lost during the journey which supported the version that 6 tyres instead of 8 were actually loaded. It is curious that Das never left the van even when Subramaniam went out and on the solitary occasion when Das left the van Subramaniam was in the company of another officer of the Company at the Depot. The evidence of Subramaniam and Das taken together excludes the possibility of loading of 8 tyres. And this is how Das comes into the picture. It is obvious that the enquiring officer and the Manager relied upon the evidence of those who loaded the tyres supported as it was by the admission several times repeated by Subramaniam that he had checked the tyres at the time of loading In other words, the Management refused to believe Subramaniam even though he was supported by Das. This the Management was entirely within its right in doing and the Tribunal was in error in exercising appellate powers by coming to a different conclusion. All that the Tribunal could do was to see that the enquiry was properly conducted. As in our opinion the enquiry was so conducted the decision of the Tribunal cannot be supported.

The appeal therefore succeeds and will be allowed but in the circumstances of the case we make no order about costs. On behalf of the Company it was stated that the amount paid to the workman during the pendency of the appeal as part of the wages will not be asked to be returned.

V.M.K. *Appeal allowed.*

S-5

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. N. WANCHOO, *Chief Justice*, R S BACHAWAT AND G.K. MITTER, JJ.

P.S.N.S.Ambalavana Chettiar & Company Ltd., and another .. *Appellants**

v.

Express Newspapers Ltd , Bombay .. *Respondent.*

Sale of Goods Act (III of 1930), *sections* 54 (2) *and* 18—*Right of re-sale under section* 54 (2) —*When arises—Contract for sale of unascertained goods—Property in goods when passes to buyer.*

Contract Act (IX of 1872), *section* 73—*Breach of contract—Measure of damages*

The seller can claim as damages the difference between the contract price and the amount realised on re-sale where he has the right of re-sale under section 54 (2) of the Sale of Goods Act. The statutory power of re-sale under section 54 (2) arises if the property in the goods has passed to the buyer subject to the lien of the unpaid seller. Where the property in the goods has not passed to the buyer, the seller has no right of re-sale under section 54 (2).

In the present case, on 13th November, 1951, the respondent agreed to sell to the appellants the stock of 415 tons of newsprint in sheets then lying in the respondent's godown Thus there was an unconditional contract for the sale of specific goods in a deliverable state and the property in the goods then passed to the appellants. But on 26th November, 1951, the contract was varied in a material particular. The parties agreed that the appellant would buy only 300 tons out of the stock of 415 tons of newsprint then lying in the respondent's godown The result was that in the place of the contract for sale of specific goods a contract for sale of unascertained goods was substituted.

Section 18 of the Sale of Goods Act provides that where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained. It is a condition precedent to the passing of property under a contract of sale that the goods are ascertained. The condition is not fulfilled where there is a contract for sale of a portion of a specified larger stock. Till the portion is identified and appropriated to the contract, no property passes to the buyer.

In the instant case no portion of 415 tons of the newsprint lying in the respondent's godown was appropriated to the contract by the respondent with the appellant's consent before the re-sale. Consequently, the respondent has no right to resell the goods under section 54 (2). The claim to recover the deficiency on re-sale is not sustainable.

In the case of breach of contract by a buyer the seller is entitled to claim as damages the difference between the contract price and the market price on the date of the breach Where no time is fixed under the contract of sale for acceptance of the goods, the measure of damages is *prima facie* the difference between the contract price and the market price on the date of the refusal by the buyer to accept the goods.

Appeals from the Judgment and Decree dated the 7th May, 1960 of the Madras High Court in O S.A Nos 25 and 52 of 1956.

S. V. Gupte, Senior Advocate, (*Naunit Lal* and *R. Thiagarajan*, Advocates, with him), for Appellants (In both the Appeals)

N. C. Chatterjee, Senior Advocate, (*S. Balakrishnan*, Advocate for *R. Ganapathy Iyer*, Advocate, with him), for Respondent (In both the Appeals).

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* C. As. Nos. 165 and 166 of 1965. 10th November, 1967.

The Judgment of the Court was delivered by

Bachawat, J —The dispute arises out of a contract between the appellants and the respondent entered into on 13th November, 1951. The terms of this contract were recorded in writing in the form of a letter written by the respondent to appellant No. 1 and set out below:

" Messrs. P. S. N. S Ambalavana Chettiar and Company Ltd.,

260, Angappa Naicken Street, Madras.

Dear Sirs,

We confirm having purchased from you and the Madras Paper Marketing Company, Madras, 500 tons of Russian Newsprint as per the following description :—

About 70 per cent. in reels of 34 inches width.

About 15 per cent. in reels of 22 inches width.

About 15 per cent. in reels of 36 inches width.

at annas 9 per lb. Ex-Wharf Bombay duty, etc., paid. The buyers are to take delivery within four days of the offer of delivery. Any wharfage, etc , up to the fourth day of the offer of delivery will be on seller's account and thereafter on buyer's account.

We have also sold you about 415 tons of Russian newsprint in sheets in size of about 30″ x 42″ (760 mm x 1083 mm) ex-godown, Madras at Rs. 0-9-6 per lb

We will keep the stock of sheets in our godown on your account free of rent.

We shall advance you moneys against this newsprint at annas 8 per lb. This advance will carry interest at 5 per cent. per annum We will also charge you the exact amount of insurance which we pay to our Insurance Company against the goods

We shall pay Rs. 5,60,000 to your Bankers in Bombay and take delivery of the 500 tons of newsprint from the harbour in Bombay. Accounts will be made on the basis of the above arrangement and whatever one party is liable to pay to the other will be adjusted subsequently.

Thanking you,

Yours faithfully,

For Express Newspapers Limited

Director."

The document shows that the respondent agreed to buy from the appellants 500 tons of Russian newsprint in reels at 9 annas per lb , ex-wharf, Bombay and to take delivery of the goods on payment of Rs 5,60,000 At the same time, the appellants agreed to buy from the respondent 415 tons of Russian newsprint in sheets then lying in a godown in Madras at 9 annas 6 pies per lb , upon the term that the appellants would pay the insurance charges and also interest at 5 per cent. per annum on an amount equivalent to the price of the goods calculated at 8 annas per lb The understanding was that the appellants would within a reasonable time take delivery of the goods bought by them in instalments, and the accounts would be finally adjusted on the completion of the deliveries. It may be mentioned that appellant No. 2 carried on business under the name and style of Madras Paper Marketing Company

On 26th November, 1951, the parties orally agreed that instead of 500 tons the respondent would buy 300 tons of newsprint in reels and that instead of 415 tons the appellants would buy 300 tons of newsprint in sheets and the terms of the contract dated 13th November, 1951, would stand varied accordingly.

On 5th December, 1951, the respondent took delivery of 300 tons of newsprint in reels on payment of Rs. 3,18,706-9-10 and a sum of Rs. 57,816-13-2 remained due to the appellants on account of the price of these goods. From 29th November, 1951 up to 27th February, 1952, the appellants took delivery of 122324 lbs. of newsprint in sheets on payment of Rs 63,032-15-9 to the respondent. Subsequently, the appellants refused to take delivery of the balance 547501 lbs of newsprint in sheets. Counsel for the parties agreed before us that 29th March, 1952, was the date when the appellants repudiated the contract On 21st April, 1952, after giving notice to the appellants the respondent re-sold the balance goods to one G. R. Lala at 6½ annas per lb.

On 18th April, 1952, the appellants filed in the High Court of Madras C S No. 175 of 1952 claiming from the respondent Rs. 57,816-13-2 on account of the balance price of 300 tons of newsprint in reels and interest thereon. The respondent admitted the claim for the balance price On 30th July, 1952, the respondent filed in the High Court of Madras C S. No. 262 of 1952 claiming a decree for Rs. 62,266-13-2 on account of the balance price of 122324 lbs, the deficiency on re-sale of 547501 lbs., of the newsprint in sheets, interest and insurance charges after setting off the sum of Rs 57,816-13-2 due to the appellants. The principal defence of the appellants was that the contract with regard to 415 tons of newsprint in sheets was cancelled in November, 1951 and that appellant No. 2 was not a party to this contract. The appellants also denied the factum and validity of the re-sale. The two suits were tried by Rajagopala Ayyangar, J He dismissed C. S No. 175 of 1952 and decreed C.S No 262 of 1952. From these two decrees, the appellants filed two appeals in the High Court of Madras. A Division Bench of the High Court dismissed the two appeals. The present appeals have been filed on certificates granted by the High Court.

The two Courts concurrently found that (1) appellant No 2 was a party to the contract of purchase of 415 tons of newsprint in sheets, (2) on 26th November, 1951, the parties orally agreed that instead of 415 tons the appellants would buy 300 tons of the newsprint and (3) there was no cancellation of the contract as alleged by the appellants These findings are not challenged. The two Courts concurrently found that the re-sale held on 21st April, 1952, was genuine and was effcted at a proper price on due notice and after proper advertisement. Mr Gupte attempted to challenge these findings, but we see no reason to interfere with them The principal argument advanced by Mr. Gupte was that the property in the goods re-sold on 21st April, 1952, had not passed to the appellants and the re-sale was consequently invalid, We are inclined to accept this argument.

It is to be noticed that the contract did not envisage any loan of money by the respondent to the appellants on the security of the newsprint in sheets. The payment of Rs. 3,18,706-9-10 was made by the respondent towards part discharge of its liability for the price of the newsprint in reels No doubt, the contract stated: "We shall advance you moneys against this newsprint at annas 8 per lb. This advance will carry interest at 5 per cent. per annum." But the real import of this clause was that the appellants would pay interest at 5 per cent. per annum on an amount equivalent to the price of the newsprint in sheets calculated at 8 annas per lb. The respondents was not a pledgee of the newsprint in sheets and had no right to sell the goods under section 176 of the Indian Contract Act, 1872. The real question is whether the respondent had the right to re-sell the goods under section 54 (2) of the Sale of Goods Act, 1930

The seller can claim as damages the difference between the contract price and the amount realised on re-sale of the goods where he has the right of re-sale under section 54 (2) of the Sale of Goods Act The Statutory power of re-sale under section 54 (2) arises if the property in the goods has passed to the buyer subject to the lien of the unpaid seller Where the property in the goods has not passed to the buyer, the seller has no right of re-sale under section 54 (2). The question is whether the property in the 300 tons of newsprint in sheets had passed to the appellants before the re-sale.

On 13th November, 1951, the respondent agreed to sell to the appellants the stock of 415 tons of newsprint in sheets then lying in the respondent's godown in Madras. There was an unconditional contract for the sale of specific goods in a deliverable state and the property in the goods then passed to the appellants. But on 26th November, 1951, the contract was varied in a material particular. The parties agreed that the appellants would buy only 300 tons of the stock of 415 tons of newsprint then lying in the respondent's godown The result was that in place of the original contract for sale of specific goods a contract for sale of unascertained goods was substituted.

Rajagopala Ayyangar, J., held that the effect of the variation of the contract on 26th November, 1951, was that the appellants and the respondent became joint owners of the stock of 415 tons In our opinion, this was not the correct legal position. The parties did not intend that the appellants would buy an undivided share in 415 tons of newsprint On 26th November, 1951, the bargain between the parties was that appellants would buy and the respondent would sell 300 tons out of the larger stock of 415 tons

The appellate Court held that the property in the entire 415 tons passed to the appellants who were subsequently relieved from their liability to take 115 tons and that the respondent could resell any 300 tons out of the larger stock of 415 tons. We are unable to accept this line of reasoning It is true that originally the property in the entire 415 tons had passed to the appellants But the result of the variation of the contract was to annul the passing of property in the goods. The effect of the bargain on 26th November, 1951, was that the respondent would sell and deliver to the appellants any 300 tons out of the larger stock of 415 tons. As from 26th November, 1951, the property in the entire stock of 415 tons belonged to the respondent. The parties did not intend that as from 26th November, 1951, the property in any individual portion of the stock of 415 tons would remain vested in the appellants.

Section 18 of the Sale of Goods Act provides that where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained. It is a condition precedent to the passing of property under a contract of sale that the goods are ascertained. The condition is not fulfilled where there is a contract for sale of a portion of a specified larger stock Till the portion is identified and appropriated to the contract, no property passes to the buyer. In *Gillett* v. *Hill*[1], Bayley, B., said:

> "Where there is a bargain for a certain quantity ex a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit, then the right to them does not pass to the vendee until the vendor has made his selection, and trover is not maintainable before that is done. If I agree to deliver a certain quantity of oil as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. There is no individuality until it has been divided "

No portion of 415 tons of the newsprint lying in the respondent's godown was appropriated to the contract by the respondent with the appellant's consent before the re-sale On the date of the re-sale, property in the goods had not passed to the buyer. Consequently, the respondent had no right to re-sell the goods under section 54 (2). The claim to recover the deficiency on re-sale is not sustainable.

The respondent is entitled to claim as damages the difference between the contract price and the market price on the date of the breach. Where no time is fixed under the contract of sale for acceptance of the goods, the measure of damages is *prima facie* the difference between the contract price and the market price on the date of the refusal by the buyer to accept the goods, see *Illustration* (c) to section 73 of the Indian Contract Act In the present case, no time was fixed in the contract

1. (1834) 2 B. W M. 535; 149 R. R. 871. 873.

for acceptance of the goods. On 29th March, 1952, the appellants refused to accept the goods. The respondent is entitled to the difference between the contract price and the market price on 29th March, 1952. Counsel for both parties requested us that instead of remanding the matter we should assess the damanges on this basis and finally dispose of the matter. We have gone through the materials on the record and with the assistance of Counsel, we assess the market price of the Russian newsprint in sheets on 29th March, 1952 at 8 annas per lb. Counsel on both sides agreed to this assessment. The claim of the respondent for Rs. 6,798-5-1 on account of interest and Rs. 1,119-6-0 for insurance charges is admitted before us by Mr. Gupte. On this basis, the final position is as follows:

Price of 122324 lbs. at 9½ annas per lb less Rs 63,032-15-9 ..	Rs.	9,596	14	3
Difference *on* 547051 lbs. at 1½ annas per lb. ..	Rs.	51,286	0	6
Interest ..	Rs.	6,795	5	1
Insurance charges ..	Rs.	1,119	6	0
Total amount due to the respondent ..	Rs.	68,797	9	10
Deduct amount due to the appellants ..	Rs.	57,816	13	2
Balance due to the respondent ..	Rs.	10,980	12	8

In the result, Civil Appeal No. 165 of 1965 is allowed in part, the decrees passed by the Courts below are varied by substituting therefor a decree in favour of the respondent against the appellants for a sum of Rs. 10,980-12-8 with interest thereon at 6 per cent. per annum from 30th July, 1952. The decrees for costs passed by the Courts below are affirmed. There will be no order as to costs in this Court. Civil Appeal No. 166 of 1965 is dismissed. No order as to costs thereof.

V.K. *Appeal No.* 165 of 1965 *allowed in part;*
Appeal No. 166 *of* 1965 *dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT:—J. C. SHAH, S. M. SIKRI AND J.M. SHELAT, JJ.

Sri Rama Vilas Service Ltd., Kumbakonam .. *Appellants**

v.

M/s. Raman and Raman Private Ltd., and another .. *Respondents.*

Motor Vehicles Act (IV of 1939), *as amended by Madras Act (III of* 1964), *section* 48 (3) (xxi)—*Effect of amendment—Permit granted before the amending Act—Condition specified in section* 48 (3) (xxi), *as amended, if should be deemed to be attached to permit—Variation of route relating to such a permit—Applicability of restriction regarding* 24 *kilometres.*

Madras Motor Vehicles Rules, Rule 208—*Scope.*

The contention that section 48 (3) (*xxi*), as amended by Madras Act III of 1964, operates whether a condition to that effect has been put in a permit or not, is untenable Section 48 (3) clearly enables the Regional Transport Authority to attach to the permit any one of the twenty-one conditions. It may in a particular case put one or two or more of the conditions or it may put all the conditions. It is common ground that if any of the first twenty conditions in section 48 (3) is not attached to a permit it will not have effect. What makes condition (*xxi*) different is hard to appreciate. If condition (*xxi*) as amended is not attached to a permit it is difficult to see how the Regional Transport Authority can derive any power from the existence of section 48 (3) (*xxi*) in the Act. Section 5 (1) of Madras Act III of 1964 makes the route or routes or the area

* C.A. No. 258 of 1967 20th October, 1967.

specified in every stage carriage permit granted before the commencement of the Amending Act a condition attached to such permit under sub-section (3) of section 48 of the principal Act, it does not say that section 48 (3) (*xxi*) shall be deemed to be a condition attached to every such permit

In the instant case the High Court erred in holding that section 48 (3) (*xxi*) of the Act, as amended, by itself gave power to the Regional Transport Authority to vary the route within certain limits. This power would be exercisable only if a condition to that effect is put in the permit. In the case of the appellant what the permit contained was a condition similar to the condition mentioned in section 48 (3) (*xxi*) before its amendment by Act III of 1964. Therefore for the purpose of this appeal section 48 (3) (*xxi*), as amended, should be treated as non-existent If so there can be no difficulty in coming to the conclusion that no limitation had been placed on the powers of the Regional Transport Authority in respect of the grant of applications for variation of the route.

As the Act stands at present, rule 208 of the Madras Motor Vehicles Rules does confer power on a transport authority to vary all kinds of permits or conditions attached therein. This power is exercised on an application made in writing by the holder of any permit.

It follows from the above that the Regional Transport Authority had the authority under rule 208 to vary the permit in the present case and nothing contained in section 48 (3) (*xxi*) limited its power in respect of the distance covered by the variation. The order of the Regional Transport Authority varying the route in the instance case, by extending it beyond 24 kms., cannot therefore be challenged as being beyond its jurisdiction.

Quare: Section 57 (8) of Motor Vehicles Act if merely procedural or also implies a power to receive applications and vary the conditions in a permit.

Appeal from the Judgment and Order, dated the 3rd October, 1966 of the Madras High Court in Writ Petition No. 1159 of 1966.

G. Ramaswamy, R. Gopalakrishnan and *K.K Venugopal*, Advocates, for Appellants.

M. N. Rangachari, M K. Ramamurthi, Mrs. Shyamala Pappu and *Vineet Kumar*, Advocates, for Respondent No. 1.

The Judgment of the Court was delivered by

Sikri, J.—This appeal by certificate granted by the High Court of Madras is directed against its order dated 3rd October, 1966, allowing the writ petition filed under Article 226 of the Constitution by M/s Raman and Raman (P.), Ltd., Kumbakonam, and quashing the order of the Regional Transport Authority, Thanjavur dated 28th March, 1966, whereby the Regional Transport Authority had granted the application for variation of the route Sirkali to Kumbakonam of M/s. Sri Rama Vilas Service Ltd, Kumbakonam, in respect of two stage carriages.

On 9th December, 1965, the application of Messrs Sri Rama Vilas Service Ltd. Kumbakonam for variation of the route Sirkali to Kumbakonam was notified under section 57 (3) of the Motor Vehicles Act, 1939 M/s. Raman and Raman (P), Ltd, among others, filed objections and after hearing the objections, by order dated 28th March, 1966, the Regional Transport Authority, Thanjavur, granted the application as, according to it, the variation applied for was in the interest of the travelling public The distance covered by the variation extended beyond 24 kilometres. M/s. Raman and Raman (P.), Ltd filed the petition under Article 226 of the Constitution to quash the order of the Regional Transport Authority

The question which arises in this appeal is whether the Regional Transport Authority had jurisdiction to vary the route by extending it beyond 24 kms. The

High Court, following its earlier decision in *M/s. Swami Motor Transport (P.), Ltd.* v. *M/s Murugan Transports, Tiruchirapalli and others*[1], held that " any variation in excess of 24 kilometres would be *ex facie* illegal and violation of the intendment of the Legislature enacting Act III of 1964 "

The answer to the question posed above depends upon the true construction of some sections of the Motor Vehicles Act, 1939, as amended by the Madras Act III of 1964. The relevant statutory provisions are as follows:

"48 (1).—Subject to the provision of section 47, a Regional Transport Authority may on an application made to it under section 46, grant a stage carriage permit in accordance with the application or with such modification as it deems fit or refuse to grant such a permit:

Provided that no such permit shall be granted in respect of any route or area not specified in the application.

(3) The Regional Transport Authority, if it decides to grant a stage carriage permit, may grant the permit for service of stage carriages of a specified description or for one or more particular stage carriages, and may, subject to any rules that may be made under this Act, attach to the permit any one or more of the following conditions, namely:

(*i*) that the stage carriage or stage carriages shall be used only on a specified route or routes or in a specified area.

* * * * *

(xxi) that the Regional Transport Authority, may after giving notice of not less than one month:

(*a*) vary, extend or curtail the route or routes or the area specified in the permit.

Provided that in the case of—

(i) variation, the termini shall not be altered and the distance covered by variation shall not exceed 24 kms.

(ii) extension of the distance covered by the extension shall not exceed 24 kms. from the termini.

(*aa*) vary any other condition of the permit.

"*Section* 57 (8).—An application to vary the conditions of any permit other than a temporary permit by the inclusion of a new route or routes or a new area or by the variation, extension or curtailment of the route or routes or area specified in the permit or in the case of a stage carriage permit, by increasing the number of services above the specified maximum, or in the case of a contract carriage permit by increasing the number of vehicles covered by the permit shall be treated as an application for the grant of a new permit."

"*Rule* 208 (*a*)—Upon application made in writing by the holder of any permit, the Transport Authority may, at any time, in its discretion, vary the permit or any of the conditions thereof subject to the provisions of sub-rule (*b*).

(*b*) If the application is for the variation of the permit by the inclusion of an additional vehicle or vehicles or if the grant of variation would authorise transport facilities materially different from those authorised by the original permit the Transport Authority shall deal with the application as if it were an application for a permit Provided that nothing contained in this rule shall prevent the Transport Authority or its Secretary, if authorised in this behalf, from summarily rejecting an application for the variation of a stage carriage permit so as to provide transport facilities on a road which has been or is certified to be unfit for motor

1. (1968) 1 M.L.J. 446 . I.L.R. (1968) 1 Mad. 21.

vehicular traffic by an officer not below the rank of Divisional Engineer of the Highways Department.

(*c*) Every application for variation of conditions of permit under sub-section (8) of section 57 of the Act in respect of a transport vehicle shall be in Form PVA.

(*d*) The provisions of rules 163 (*b*) shall, *mutatis mutandis*, apply to application for the variation of a permit or the variation of the counter-signature, if any, thereof by the inclusion of an additional vehicle sanctioned subject to the production of the registration certificate of the additional vehicle."

Section 5 of the Madras Act III of 1964, reads as follows:

"5. (1) Notwithstanding anything contained in the principal Act, the route or routes or the area specified in every stage carriage permit granted before the commencement of this Act shall be deemed to be a condition attached to such permit under sub-section (3) of section 48 of the principal Act, as if this Act were in force on the date of grant of such permit.

(2) Notwithstanding any judgment or order of any Court, all proceedings taken for the grant of, and all orders passed granting any variation, extension or curtailment of the route or routes or the area specified in a stage carriage permit before the commencement of this Act by the State Transport Authority or by a Regional Transport Authority or by an authority or person to whom the powers and functions of the State Transport Authority or a Regional Transport Authority have been delegated, or by an authority exercising the powers of appeal or revision against the orders of the State Transport Authority or a Regional Transport Authority, shall not be deemed to be invalid merely by reason of the fact that the State Transport Authority or the Regional Transport Authority, as the case may be, had no power to grant such variation, extension or curtailment and all such proceedings taken or orders passed shall be deemed always to have been validly taken or passed in accordance with law notwithstanding the distance covered by the variation or extension exceeded twenty-four kilometres."

The learned Counsel for the respondent contends that section 48 (3) (*xxi*), as amended, operates whether a condition to that effect has been put in a permit or not. But we are unable to read section 48 in this sense Section 48 (3) clearly enables the Regional Transport Authority to attach to the permit any one of the twenty-one conditions. It may in a particular case put one or two or more of the conditions or it may put all the conditions. It seems to be common ground that if any of the first twenty conditions in section 48 (3) is not attached to a permit it will not have effect. What makes condition (*xxi*) different is hard to appreciate. If condition (*xxi*) as amended is not attached to a permit it is difficult to see how the Regional Transport Authority can derive any power from the existence of section 48 (3) (*xxi*) in the Act. Section 5 (1) of Act III of 1964 makes the route or routes or the area specified in every stage carriage permit granted before the commencement of the Amending Act a condition attached to such permit under sub-section (3) of section 48 of the principal Act; it does not say that section 48 (3) (*xxi*) shall be deemed to be a condition attached to every such permit. The learned Counsel for the respondent says that this was the intention of the amendment, but if this was so, the intention has not been carried out.

It was argued before us that the history of legislation supports the interpretation placed by the High Court but, in our view, the Act as it stands amended by Act III of 1964 is quite clear and it is not necessary to go into the history of the legislation.

It seems to us that the High Court erred in holding that section 48 (3) (*xxi*) of the Act, as amended, by itself gave power to the Regional Transport Authority to vary the route within certain limits. This power, in our view, would be exercisable only if a condition to that effect is put in the permit. In the case of the appellant we saw the permit and what it contained was a condition similar to the condition men-

tioned in section 48 (3) (*xxi*) before its amendment by Act III of 1964. Therefore, for the purpose of this appeal we must treat section 48 (3) (*xxi*), as amended, as non-existent. If section 48 (3) (*xxi*), as amended, is treated as non-existent, then there can be no difficulty in coming to the conclusion that no limitation had been placed on the powers of the Regional Transport Authority in respect of the grant of applications for variation of the route The order of the Regional Transport Authority cannot, therefore, be challenged as being beyond its jurisdiction.

Another question that was debated before us was whether rule 208 of the Madras Motor Vehicles Rules, extracted above, confers powers on a Transport Authority to vary permits or whether it is merely a procedural rule. It seems to us that as the Act stands at present, rule 208 does confer power on a transport authority to vary all kinds of permits or conditions attached therein This power is exercised on an application made in writing by the holder of any permit.

It follows from the above reasoning that the Regional Transport Authority had the authority under rule 208 to vary the permit and nothing contained in section 48 (3) (xxi) limited its power in respect of the distance covered by the variation in this case.

We may mention that it was argued before us that section 57 (8) is not merely procedural but also implies a power to receive applications and vary the conditions in a permit. This may be so, but it is not necessary to decide in this case because in Madras rule 208 clearly confers power on the Transport Authority to vary the conditions of the permit.

In the result the appeal is allowed and the judgment of the High Court set aside. The appellant will have the costs incurred in this Court.

V.K. ——— *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J. C. SHAH, S. M. SIKRI AND J. M. SHELAT, JJ.

Calcutta Credit Corporation Ltd. and another .. *Appellants* *

v.

Happy Homes (Private) Ltd. .. *Respondent.*

Transfer of Property Act (IV of 1882), *sections* 106, 111 (h) *and* 113—*Termination of tenancy—Notice by the tenant—Acceptance by the landlord—Withdrawal of the notice by the tenant—Effect—Tenancy, if stands determined—Notice not complying with section* 106 *but accepted and acted upon by the landlord—Effect.*

West Bengal Premises Rent Control (Temporary Provisions) Act (XVII of 1950), *sections* 2 (11), 12 (1) *and* 13 (2)—*Interpretation—Statutory tenant—Meaning of—If could claim the right and interest of a contractual tenant under the Act*

AB were tenants holding over in respect of the demised premises after the expiry of the period of original lease. By their notice, dated 12th August, 1953 they intimated their intention to vacate the premises on 31st August, 1953, at 3-30 P M. They thereafter withdrew this intimation by letter, dated 25th August, 1953 The landlord did not agree to the withdrawal of the notice, dated 12th August, 1953, and insisted that possession of the demised premises be delivered. By clause (*h*) of section 111 of the Transfer of Property Act, 1882, a lease of immovable property is determined on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other

Did the tenancy of *AB* stand determined by the notice, dated 12th August, 1953 ?

* C.A. No. 71 of 1965. 23rd October, 1967.

Did *AB* acquire the status of "statutory tenants" under the provisions of the West Bengal Premises Rent Control (Temporary Provisions) Act XVII of 1950 enabling them to sub-let the premises in their occupation ?

Held that, section 113 of the Transfer of Property Act, 1882, contemplates waiver of the notice by any act on the part of the person giving it, if such an act shows an intention to treat the lease as subsisting and the other party gives his consent—express or implied therefor. Once a notice is served determining the tenancy or showing an intention to quit on the expiry of the period of the notice the tenancy is at an end, unless with the consent of the other party to whom the notice is given the tenancy is agreed to be treated as subsisting. Here, on the expiration of the period of notice, dated 12th August, 1953, the tenancy of *AB* stood determined.

A notice which complies with the requirements of section 106 of the Transfer of Property Act operates to terminate the tenancy, whether or not the party served with the notice assents thereto. A notice which does not comply with the requirements of section 106 in that it does not expire with the end of the month of tenancy, or the end of the year of the tenancy, as the case may be, or of which the duration is shorter than the duration contemplated by section 106, may still be accepted by the party served with the notice and if that party accepts and acts upon it, the party serving the notice will be estopped from denying its validity Because, a tenancy being founded in contract, it is always open to the parties thereto to agree that the tenancy shall be determined otherwise than by notice, served in the manner provided by section 106 or by a notice of a duration shorter than the period provided by Transfer of Property Act. The contents of the letter written by the Attorney of the landlord clearly prove, in the absence of any evidence to the contrary, that the offer to terminate the tenancy on 31st August, 1953, was accepted by the landlord and the landlord had acted upon that offer.

In order to determine a tenancy under the Transfer of Property Act at the instance of a tenant, it is not necessary that there must be actual delivery of possession before the tenancy is effectively determined.

Considered in the light of the scheme and object of the Act, the expression 'tenant' in clause (*c*) of section 12 (1) or in section 13 (2) of the West Bengal Premises Rent Act of 1950 must mean a contractual tenant alone and not a statutory tenant. The definition in section 2 (11) of the expression 'tenant' includes a statutory tenant. But the definition does not apply if there is anything repugnant in the subject or context. A statutory tenant has no interest or estate in the premises occupied by him, and it is very difficult to hold that the Legislature without making an express provision to that effect intended to invest him with power to induct into the premises in his possession a person who would be entitled to claim the right and interest of a contractual tenant.

Appeal from the Judgment and Decree, dated the 1st February, 1962 of the Calcutta High Court in Appeal No. 65 of 1959

T. P Das, M. G. Poddar, V. N. Poddar, H. K. Puri and *B N Kirpal*, Advocates, for Appellants.

A. N. Sinha and *S. N Mukherjee*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Shah, J—A building in the town of Calcutta belonging to the Chitpore Golabari Company (Private) Ltd, was let out under a written lease for a period of twelve years commencing from 1st January, 1939, to Messrs. Allen Berry & Co, Ltd.—hereinafter called 'Allen Berry'. Under the terms of the lease sub-letting or parting with the possession of the demised premises or any part thereof by the tenants without the previous consent in writing of the landlord was expressly prohibited. After the expiry of the period Allen Berry continued to hold over the premises. On 12th August, 1953 Allen Berry served a notice in writing upon the landlord intimating

their intention to vacate the premises "on 31st August, 1953, at 3-30 P.M." and requested the landlord to arrange to take delivery of possession. By letter, dated 26th August, 1953, Allen Berry informed the landlord that they did not intend to vacate the premises on 31st August, 1953, as originally intimated, or at all, and that the notice, dated 12th August, 1953, be treated as cancelled. By letter, dated 28th August, 1953, Attorney of the landlord informed Allen Berry that the earlier notice, dated 12th August, 1953, could not be withdrawn except by mutual consent, and since the landlord had agreed to lease the premises to Messrs. Dunlop Rubber Co. (India) Ltd. with effect from 1st September, 1953 the landlord was unable to give his consent to such withdrawal, and that it would insist upon Allen Berry vacating the premises as already intimated. Allen Berry addressed a letter to the landlord on 14th September, 1953, intimating that they were holding over the premises on the expiry of the lease "according to the provisions of the Rent Control Act". On 20th February, 1954, the landlord called upon Allen Berry to vacate and deliver possession of "the premises on the expiry of 31st March, 1954". Allen Berry failed to carry out the requisition, and on 7th May, 1954, they sub-let a part of the ground floor measuring approximately 2,100 sq. ft. to Happy Homes (Private) Ltd.—respondent in this appeal.

The landlord then instituted a suit against Allen Berry claiming a decree in ejectment in respect of the demised premises and for mesne profits and other reliefs. This suit was settled on 28th March, 1955, and a consent decree was passed. The important recitals in the decree were that (1) Allen Berry had surrendered the tenancy by notice, dated 12th August, 1953; (2) that they had handed over possession of the portion of the premises in their occupation to the landlord; (3) that the landlord will be at liberty either to retain the sub-tenant or to eject him; and (4) that the sub-tenancy had been created without the knowledge and consent of the landlord.

The landlord then sued Messrs. Happy Homes (Private) Ltd.—hereinafter called 'the respondent'—in the High Court of Calcutta for a decree for possession of the premises in its occupation and for mesne profits. The suit was resisted by the respondent principally on two grounds: (i) that the tenancy of Allen Berry was not determined before the sub-letting in their favour; and (ii) that even if it be held that the tenancy of Allen Berry was determined before 7th May, 1954, by virtue of the provisions of the West Bengal Rent Control (Temporary Provisions) Act, 1950, the respondent became a direct tenant of the landlord and was entitled to the benefits of that Act.

S. P. Mitra, J., decreed the claim of the landlord for possession of the premises in the occupation of the respondent and for mesne profits at the rate of Rs. 495 per month from 1st March, 1955 till delivery of possession.

During the pendency of the appeal against the decree passed by S. P. Mitra, J. the landlord transferred the premises to Messrs. Calcutta Credit Corporation Ltd. The landlord and the transferee will collectively be referred to hereinafter as 'the landlord'. A Division Bench of the High Court reversed the decree passed by S. P. Mitra, J., and ordered that the claim of the landlords be dismissed.

Whether the tenancy of Allen Berry stood determined by the notice, dated 12th August, 1953, may first be considered. Allen Berry were tenants holding over in respect of the demised premises after the expiry of the period of the original lease. By their notice, dated 12th August, 1953, they intimated their intention to vacate the premises on 31st August, 1953, at 3-30 P.M. They thereafter withdrew this intimation by letter, dated 25th August, 1953. The landlord did not agree to the withdrawal of the notice, dated 12th August, 1953, and insisted that possession of the demised premises be delivered. By clause (*h*) of section 111 of the Transfer of Property Act, 1882, a lease of immovable property is determined on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other. It was urged on behalf of the landlord that the notice of intention to quit the property leased and to determine the lease

given by the tenant to the landlord could not be withdrawn, and the relation of landlord and tenant may be restored only if by mutual agreement between the landlord and tenant a fresh tenancy was created Reliance in support of this contention was placed upon the observations made in Foa's ' General Law of Landlord and Tenant', 8th Edition, at page 613:

> " A notice to quit cannot be "waived": for once a valid notice is given, the tenancy will inevitably be determined upon its expiration. But though the parties cannot waive the notice, they may nullify its operation as to quitting, by agreeing upon a new tenancy, whether on the terms of the former or not, to commence from the time of its expiration.",

and upon similar observations in Woodfall on Landlord and Tenant, Vol. I, 26th Edn, Article 2114, at page 973; and upon the judgment of the Court of Exchequer in *Tayleur* v. *Wildin*[1]. Counsel for the respondent contended that the rights and obligations of the parties are governed by the provisions contained in section 113 of the Transfer of Property Act, and that it is open to a tenant to withdraw the notice of intention to quit before the expiry of the period thereof. Counsel also contended that the tenancy was not determined, because the notice served by Allen Berry was not a notice "duly given" within the meaning of section 111 of the Transfer of Property Act.

Section 113 of the Transfer of Property Act provides:

> " A notice under section 111, clause (*h*), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting."

Clearly section 113 contemplates waiver of the notice by any act on the part of the person giving it, if such an act shows an intention to treat the lease as subsisting and the other party gives his consent—express or implied therefor. The law under the Transfer of Property Act on the question in hand is not different from the law in England Once a notice is served determining the tenancy or showing an intention to quit on the expiry of the period of the notice, the tenancy is at an end, unless with the consent of the other party to whom the notice is given the tenancy is agreed to be treated as subsisting. It was held in *Tayleur* v *Wildin*[1] that a notice determining a tenancy cannot be withdrawn In *Tayleur* v. *Wildin*[1] an annual tenancy of a farm under a written lease commencing on Lady Day *i e.*, 25th March, was determined by a notice by which the landlord called upon the tenant to quit the farm at the expiration of the current year's tenancy. Before the expiry of the year of tenancy the arrears of rent were paid up by the tenant, and the notice was withdrawn and the tenant continued in occupation of the farm under the terms of the original agreement. It was held by the Court of Exchequer that the tenancy was determined by the notice to quit, and a surety for payment of rent under the original lease was not liable for rent falling due after the expiry of the notice. Kelly, C B., observed that whether the notice is given by the landlord or the tenant, the party to whom it is given is entitled to insist upon it, and it cannot be withdrawn without the consent of both. The consent of the parties makes a new agreement, and the rent became due under a new agreement In our judgment, that principle applies to the law of landlord and tenant in India Therefore on the expiration of the period of notice, dated 12th August, 1953, the tenancy of Allen Berry stood determined.

But, it was contended, the notice intimating an intention to quit at 3-30 P.M. on 31st August, 1953, was not a notice " duly given " within the meaning of section 111 (*h*) of the Transfer of Property Act It is not necessary to decide for the purpose of this case whether the month of the tenancy of Allen Berry expired on the midnight of the first day of every calendar month, for, in our judgment, a notice which is defective may still determine the tenancy, if it is accepted by the landlord A notice which complies with the requirements of section 106 of the Transfer of Property Act operates to terminate the tenancy, whether or not the party served with

1. (1867-68) L.R. 3 Ex. C. 303.

the notice assents thereto. A notice which does not comply with the requirement of section 106 of the Transfer of Property Act in that it does not expire with the end of the year of the tenancy, as the case may be, or of which the duration is shorter than the duration contemplated by section 106, may still be accepted by the party served with the notice and if that party accepts and acts upon it, the party serving the notice will be estopped from denying its validity. The defect in the notice served by one party may undoubtedly be relied upon by the other party and he may plead that the tenancy does not stand determined, but after the notice is accepted by the other party who acts upon it, the party serving the notice cannot contend that the notice served by him was defective, and on that account the tenancy was not determined. The reason of the rule is clear A tenancy is determined by service of the notice in the manner prescribed by section 111 (*h*) read with section 106 of the Transfer of Property Act If the notice is duly given, the tenancy stands determined on the expiry of the period of the tenancy. Even if the party served with the notice does not assent thereto, the notice takes effect. If the notice is defective, it does not operate to terminate the tenancy by force of the statute. But a tenancy is founded in contract, and it is always open to the parties thereto to agree that the tenancy shall be determined otherwise than by notice served in the manner provided by section 106 of the Transfer of Property Act, or by a notice of a duration shorter than the period provided by the Act. If the parties so agree, the tenancy will come to an end.

The landlord according to the terms of the agreement by its letter, dated 28th August, 1953, informed Allen Berry that it did not agree to the withdrawal of the notice, since it had already agreed to lease out the premises to Messrs. Dunlop Rubber Co. (India) Ltd., with effect from 1st September, 1953. The contents of the letter clearly prove, in the absence of any evidence to the contrary, that the offer to terminate the tenancy on 31st August, 1953, was accepted by the landlord and the landlord had acted upon that offer. The tenancy stood determined as proposed by Allen Berry. Allen Berry could not thereafter claim, in the absence of a fresh agreement, that there was a subsisting contractual tenancy

We are unable to agree with counsel for the respondent that in order to determine a tenancy under the Transfer of Property Act at the instance of a tenant, there must be actual delivery of possession before the tenancy is effectively determined. That contention is contrary to the plain terms of section 111 (*h*) of the Transfer of Property Act. We are therefore of the opinion that by virtue of the notice, dated 12th August, 1953, and acceptance thereof by the landlord, the tenancy of Allen Berry was determined at 3-30 P.M on 31st August, 1953 It is unnecessary in that view to consider whether the notice, dated 20th February, 1954, requiring Allen Berry to vacate and deliver possession of the premises to the landlord on expiry of 31st March, 1954, was a valid notice.

Counsel for the respondent urged that granting that the tenancy of Allen Berry stood determined by the notice, dated 12th August, 1953, and acceptance thereof by the landlord, Allen Berry acquired the status of "statutory tenants" and could claim protection of the West Bengal Premises Rent Control (Temporary Provisions) Act XVII of 1950, and were competent by virtue of the provisions of that Act to sublet the premises in their occupation.

In *Anand Nivas Private Ltd.* v. *Anandji Kalyanji Pedhi and others*[1], this Court in dealing with the analogous provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, explained the nature of the right and interest of a "statutory tenant" in premises in his occupation It was observed at page 908 by the majority of the Court:

"A person remaining in occupation of the premises let to him after the determination of or expiry of the period of the tenancy is commonly, though in law not

1. (1964) 4 S.C.R. 892

accurately, called a "statutory tenant". Such a person is not a tenant at all; he has no estate or interest in the premises occupied by him. He has merely the protection of the statute in that he cannot be turned out so long as he pays the standard rent and permitted increases, if any, and performs the other conditions of the tenancy. His right to remain in possession after the determination of the contractual tenancy is personal; it is not capable of being transferred or assigned, and devolves on his death only in the manner provided by the statute."

In *Solomon* v. *Orwell*[1], Denning, L J. in dealing with the provisions of the Landlord and Tenant (Rent Control) Act, 1949, spoke as follows:

"When a statutory tenant sub-lets a part of the premises, he does not thereby confer any estate or interest on the sub-tenant. A statutory tenant has no estate or interest himself, and he cannot carve something out of nothing. The sub-tenant, like the statutory tenant, has only a personal right or privilege. The question is: What is the position of the sub-tenant when the statutory tenancy comes to an end? A statutory tenancy may, of course, come to an end without a notice to quit, *e g.* by death (if there are no entitled relatives) or by the delivery up of the premises to the landlord. When the statutory tenancy comes to an end, the sub-tenant's right automatically comes to an end unless there is some statutory protection afforded to him"

It was urged that the West Bengal Premises Rent Control (Temporary Provisions) Act XVII of 1950 expressly conferred upon a statutory tenant the right to sub-let the premises and a sub-tenant inducted into the premises by the statutory tenant acquires, on the determination of the tenancy of the statutory tenant, the rights of a tenant of the premises under the landlord Reliance in that behalf was placed upon the definition of 'tenant' in section 2 (11) and sections 12 and 13 of the Act. The expression 'tenant' is defined in section 2 (11) as meaning any person by whom rent is, or but for a special contract would be, payable for any premises, and includes any person who is liable to be sued by the landlord for rent. Section 12 grants protection to tenants against eviction By sub-section (1), in so far as it is material it is provided:

"Notwithstanding anything to the contrary in any other Act or law, no order or decree for the recovery of possession of any premises shall be made by any Court in favour of the landlord against a tenant, including a tenant whose lease has expired:

'Provided that nothing in the sub-section shall apply to any suit or decree for such recovery of possession,—

(*a*) against a tenant who has transferred his tenancy right in whole or in part with possession otherwise than by sub-lease;

(*b*) against such transferee;

(*c*) against a tenant who has sub-let the whole or a major portion of the premises for more than seven consecutive months:

Provided that if a tenant who has sub-let major portion of the premises agree to possess as a tenant the portion of the premises not sub-let on payment of rent fixed by the Court, the Court shall pass a decree for ejectment from only a portion of the premises sub-let and fix proportionately fair rent for the portion kept in possession of such tenant which portion shall thenceforth constitute premises under clause (8) of section 2 and the rent so fixed shall be deemed standard rent fixed under section 9, and the rights and obligations of the sub-tenants of the portion from which the tenant is ejected shall be the same as of sub-tenants under the provisions of section 13,

* * * * * * * "

1. (1954) 1 All E.R. 874.

Section 12 (1) confers protection to a tenant—which expression includes a tenant whose lease has expired—against eviction by any order or decree of the Court. But that protection is lost in cases contemplated by clauses (a) to (i) of sub-section (1).

If a tenant has sub-let the premises let to him in its entirety, he loses the protection of section 12. If he has sub-let a major portion of the premises for more than seven consecutive months, he also loses the protection. It is implicit that if the tenant has sub-let only a small portion of the premises occupied by him, he does not lose the protection. The tenancy continues, and the sub-tenant of such a small portion would, it is apprehended, be entitled to remain in possession. Where, however, a major portion of the premises has been sub-let, it would be open to the tenant to offer to possess as a tenant the portion of the premises not sub-let by him. In that case the sub-tenants would have the same rights and privileges as are conferred by section 13. Section 13 provides:

> "(1) Notwithstanding anything contained in this Act, or in any other law for the time being in force, if a tenant inferior to the tenant of the first degree sub-lets a whole or a part the premises let to him except with the consent of the landlord and of the tenant of a superior degree above him, such sub-lease shall not be binding on such non-consenting landlord, or on such non-consenting tenant.
>
> *Explanation*.—In this sub-section—
>
> (a) "tenant of the first degree" means a tenant who does not hold under any other tenant;
>
> (b) "a tenant inferior to the tenant of the first degree" means a tenant holding immediately or mediately under a tenant of the first degree;
>
> (c) "landlord" means the landlord of a tenant of the first degree.
>
> (2) Where any premises or any part thereof have been or has been sub-let by "a tenant of the first degree" or by "a tenant inferior to a tenant of the first degree", as defined in *Explanation* to sub-section (1), and the sub-lease is binding on the landlord of such last mentioned tenant, if the tenancy of such tenant in either case is lawfully determined otherwise than by virtue of a decree in a suit obtained by the landlord by reason of any of the grounds specified in clause (h) of the proviso to sub-section (1) of section 12, the sub-lessee shall be deemed to be a tenant in respect of such premises or part, as the case may be, holding directly under the landlord of the tenant whose tenancy has been determined, on terms and conditions on which the sub-lessee would have held under the tenant if the tenancy of the latter had not been so determined:
>
> Provided * * * *"

We are not directly concerned in the present case with sub-section (1) of section 13. That sub-section only deals with sub-letting by a tenant inferior to "the tenant of the first degree". In the present case, Allen Berry were direct tenants from the landlord and initially were "tenants of the first degree". Sub-section (2) deals with cases of sub-letting by tenants of the first degree or by a tenant inferior to the tenant of the first degree as defined in the *Explanation* to sub-section (1), and such sub-lease is binding on the landlord of such last mentioned tenant. It is provided thereby that if the tenancy of such tenant is lawfully determined otherwise than for personal occupation, the sub-lessee will be deemed to be a tenant in respect of such premises or part thereof and will hold directly under the landlord or the tenant whose tenancy has been determined.

Counsel for the respondent contended that a sub-tenant of a statutory tenant is entitled to the protection of section 13 (2) of Act XVII of 1950, and relied upon the following observations made by this Court in *Indra Kumar Karnani* v. *Atul Chandra Patitundi and another*[1]:

1. (1966) 1 S.C.J. 176. (1965) 3 S.C.R. 329.

"Section 13 (2) refers to both the class of sub-leases and states that if the sub-lease has been made by a tenant of the first degree, the sub-lessee shall be deemed to be a tenant in respect of the premises demised to him if the tenancy of such tenant is lawfully determined under the provisions of the Act otherwise than by virtue of a decree in a suit obtained by the landlord by reason of any of the grounds specified in clause (*h*) of the proviso to sub-section (1) of section 12 * * * * It follows that in the case of sub-letting by a tenant of the first degree no consent of the landlord to sub-letting is required as a condition precedent for acquisition by the sub-lessee of the tenant's right but in the case of sub-letting by a tenant inferior to the tenant of the first degree the consent of the landlord and also of the tenant of the superior degree above him to the sub-letting is necessary if the sub-lessee is to acquire the rights of the tenant contemplated by section 13 (2)".

But the Court decided in *Indra Kumar Karnani's case*[1], that a covenant in the lease prohibiting a tenant from sub-letting, in respect of premises governed by the West Bengal Premises Rent Control (Temporary Provisions) Act (XVII of 1950) does not prevent the sub-tenant under a contractual tenant from setting up the claim that he has become entitled under section 13 (2) of the Act to the rights of the tenant in respect of the premises or part thereof sub-let to him The case is not an authority for the proposition that a tenant whose tenancy is determined, and who continues to remain in occupation merely by virtue of the protection conferred upon him by the statute is entitled to sub-let

Counsel then contended that the Legislature has, notwithstanding the disabilities of the statutory tenant, by express enactment conferred upon him the privilege of inducting into the premises held by him a sub-tenant, who would be entitled to claim the rights of a contractual tenant against the landlord in the events mentioned in the proviso to section 12 (1) (*c*) and section 13 (2) Relying upon the definition of tenant in section 2 (11) of the Act, Counsel argued that in section 12 the expression "tenant" includes a statutory tenant as well as a contractual tenant, and that if a sub-tenant in respect of a part of the premises is protected by the express provision contained in the proviso to section 12 (1) (*c*), a sub-teant of the entire premises whether the tenant is a contractual or a statutory tenant is entitled to protection of the Act According to Counsel sections 12 (1) (*c*) proviso and 13 (2) are parts of a single scheme, and the expression "tenant" in both the sections includes a statutory tenant, and sub-tenants inducted by the statutory tenants in the premises are entitled to the protection of the Act. Reliance in support of this contention was placed upon a Full Bench judgment of the Calcutta High Court in *Krishna Prasad Bose* v *Smt. Sarajubala Dassi and another*[1], wherein it was held that a tenant under the Act includes an ex-tenant, that is, a tenant whose contractual tenancy has come to an end, but who is still in possession (occupation)—actual or constructive—of the premises; and such a tenant who continues in possession by virtue of protection against eviction under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, is entitled to sub-let the premises and the sub-tenant may claim the benefit and protection of section 13 (2)

We are unable to agree with the contention raised by Counsel for the respondent. In our view, since a statutory tenant has merely a personal right to protect his possession, and has no estate or interest in the premises occupied by him, he cannot convey an estate or interest which he does not possess. A statutory tenant by parting with possession forfeits the protection of the Act, and unless the statute expressly provides or clearly implies otherwise, the person inducted by him cannot claim the protection of the Act In our judgment, clause (*c*) of section 12 (1) applies only to a case in which the tenant has an interest in the estate which he could sub-let. Similarly, section 13 contemplates a case in which a contractual tenant has sub-let the premises If it be held that the expression 'tenant' in section 13 (2) and in

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1. A.I.R 1961 Cal. 505.

clause (c) of section 12 (1) includes a statutory tenant, an estate or an interest in the demised premises would be conferred by him upon a transferee which the tenant himself does not possess, and that a tenant who has acted contrary to the provisions of clauses (m), (o) and (p) of section 108 of the Transfer of Property Act, or has used the property for immoral or illegal purposes, or has committed acts of negligence and default which may materially deteriorate the condition of the premises, or has otherwise been guilty of conduct which is a nuisance or annoyance to occupiers of adjoining or neighbouring premises including the landlord, or has failed to pay rent exceeding two months and has thereby incurred liability to forfeit the protection of the statute granted to him by section 12 (1) and whose right has been forfeited by due notices, may still sub-let the premises and the sub-lessee would then be entitled to claim the right under section 13 (2) on the determination of the tenancy of the tenant.

Considered in the light of the scheme and object of the Act, the experssion 'tenant' in clause (c) of section 12(1) or in section 13(2) must, in our judgment, mean a contractual tenant alone and not a statutory tenant. The definition in section 2(11) of the expression 'tenant' includes a statutory tenant. But the definition does not apply if there is anything repugnant in the subject or context A statutory tenant has no interest or estate in the premises occupied by him, and we are unable to hold that the Legislature without making an express provision to that effect intended to invest him with power to induct into the premises in his occupation a person who would be entitled to claim the right and interest of a contractual tenant. If the view which has appealed to the High Court of Calcutta be accepted, a statutory tenant whose right of occupation is determined by a notice to quit, because of conduct which entails forfeiture of the protection of the Act, may induct a sub-tenant so as to defeat the claim of the landlord, and presumably a tenant sued in ejectment may also exercise that privilege, for the right if granted would enure till a decree in ejectment is passed The Legislature has not made any such express provision, and no provision to that effect which makes the right of the landlord conferred by the Act to obtain a decree in ejectment against his tenant wholly illusory may be implied.

The appeal is therefore allowed and the decree passed by the Trial Court restored with the modification that mesne profits will be payable from 1st September, 1953, at the rate of Rs 495 per month till delivery of possession The landlords will be entitled to their costs in this Court and before the Division Bench of the High Court.

V M.K ——— *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—M. HIDAYATULLAH AND C. A. VAIDIALINGAM, JJ.

The State of Andhra Pradesh . *Appellant* *

v.

K. Satyanarayana and others . *Respondents*

Hyderabad Gambling Act (II of 1305-F), sections 4, 5 and 14 and Public Gambling Act (III of 1867), section 3—'Common gambling house'—What is—"Members Club"—When a common gambling house.

"Rummy"—If wholly a game of chance

The Hyderabad Gambling Act, which corresponds to the Public Gambling Act, 1867, in force in India gives a wide definition of a common gambling house and if a place could be brought within the scope of the definition even the members and Secretary and Treasurer of clubs known familiarly as "Members' Club" would *prima facie* be liable under the penal provisions of the Act But the gist of the offence under the Act in such cases is that the club should be making profit for itself from the members who use the place for the gaming.

* Cr.A. No. 40 of 1965. 22nd/23rd November, 1967

The mere fact that a club collects an extra charge for playing cards cannot mean that the club is making profit within the meaning of the definition so as to bring it under the category of common gambling house Clubs usually make an extra charge for anything they supply to their members because it is with the extra payments that the management of the club is carried on Just as some fee which is charged for the games of billiards, ping-pong, tennis, *etc* an extra charge for playing cards, unless it be extravagant would not show that the club was making profit or gain so as to render the club into a common gambling house Similarly, a late fee may be charged from members who use the club premises beyond the scheduled hours of working of the club This may be for the purpose of paying extra remuneration for the servants employed overtime by the club and for expenditure on lighting, etc. The levy of such charges are usual in many clubs and judicial notice can be taken of such facts in order to decide whether a Members' Club is making profit and would come within the definition of common gambling house

(A fee of 50 paise charged for each person playing in the card room was held to be not such a heavy or exhorbitant charge in a Members' Club so as to be described as an attempt to make profit or gain for the club.)

The cards game of "Rummy" is not a game entirely of chance like the 'three cards' game. It requires certain amount of skill because the fall of the cards has to be kept in memory and the building up of Rummy requires considerable skill in holding and discarding cards In one sense in all games in which cards are shuffled and dealt out, there is an element of chance, but in the case of Rummy it is predominantly a game of skill Hence a place where the game of Rummy is played may attract the protection under section 14 of the Act. But if it is proved that there is gambling in some other way or that the owner of the house or club is making a profit or gain from the game of Rummy or any other game played for stakes the offence may be brought home

Appeal by Special Leave from the Judgment and Order, dated the 4th August, 1964 of the Andhra Pradesh High Court in Criminal Revision Case No. 479 of 1964.

P. Ram Reddy, Senior Advocate (*B. Parthasarathy*, Advocate, with him), for Appellant.

A. S R. Chari, Senior Advocate (*K. Rajendra Chaudhuri* and *K. R. Chaudhuri*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Hidayatullah, J.—The State of Andhra Pradesh appeals by Special Leave against the judgment of the High Court of Andhra Pradesh in which, accepting a reference by the Sessions Judge, the conviction of the respondents under sections 4 and 5 of of the Hyderabad Gambling Act (II of 1305-F) ordered by the 5th City Magistrate at Secunderabad has been set aside.

The short question in this case is whether the premises of a Club known as the "Crescent Recreation Club" situated in Secunderabad were being used as a common gambling house and whether the several respondents who were present at the time of the raid by the police could be said to be gambling therein. The facts of the case are as follows :—

On 4th May, 1963, the police headed by Circle Inspector Krishnaswami raided the premises of the club. They found respondents 1—5 playing a card game known as "Rummy" for stakes. At the time of the raid, there were some counters on the table as also money and of course the playing cards with the players. Respondent No 6, the Treasurer of the Club, was also present and was holding the stake money which is popularly known as "kitty". The 7th respondent is the Secretary of the Club and he has been joined as an accused, because he was in charge of the management of the club. The kitty which the sixth respondent held was Rs. 74 62 nP. and a further sum of Rs. 218 was recovered from the table of the 6th respondent. 66 counters were on the table and some more money was found with the persons who

were indulging in the game. The evidence of the Circle Inspector is that he had received credible information that the premises of the club were being used as a common gambling house and he raided it and found evidence, because instruments of gambling were found and the persons present were actually gambling The Magistrate convicted all the seven respondents and sentenced them to various fines, with imprisonment in default. The respondents then filed an application for revision before the Sessions Judge, Secunderabad who made a reference to the High Court under section 438 of the Code of Criminal Procedure, recommending the quashing of the conviction and the setting aside of the sentences This recommendation was accepted by the learned single Judge in the High Court and the present appeal is brought against his judgment by Special Leave granted by this Court.

The Hyderabad Act follows in outline the provisions of the Public Gambling Act, 1867 in force in India Section 3 of the Act defines a "common gambling house". The translation of the Urdu text placed before us was found to be inaccurate but we have compared the Urdu definition with the the definition of "common gambling house" in the Public Gambling Act, and we are of opinion that that represents a truer translation than the one included in the official publication. We accordingly quote the definition from the Indian Act, adding thereto the *Explanation* which is not to be found in the Indian Act "Common gambling house" according to the definition means:

> "any house, walled enclosure, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, enclosure, room or place, whether by way of charge for the use of the instruments of gaming, or of the house, enclosure room or place, or otherwise howsoever.
>
> *Explanation*: The word 'house' includes a tent and all enclosed space."

The contention in regard to this definition is that the evidence clearly disclosed that the club was being used as a common gambling house and therefore the penal provisions of the Act were clearly attracted. We are concerned additionally with several sections from the Gambling Act which need to be seen. Section 4 which follows in outline the corresponding section in the Public Gambling Act, provides for penalty for an owner, occupier or person using common gambling house and includes within the reach of the section persons who have the care or the management of or in any manner assists in conducting the business of, any such house, enclosure or open space. The members of the club which is a "Members' Club" would *prima facie* be liable but as they are not before us, we need not consider the question whether they should also have been arraigned in the cause or not. The Secretary and the Treasurer, who were respectively accused Nos 7 and 6, were so arraigned as it was thought they came within the reach of section 4 because they were in the care and management of the club itself Then there is section 6 which again is similar but not entirely similar to section 5 of the Public Gambling Act. This drovides for entry for search and entry by police. It lays down as follows :—

> "If the District Magistrate or the Magistrate of the First Class or the District Superintendent of Police or the Inspector of Police in the city and the suburbs of Hyderabad, on credible information and after such enquiries as he may deem necessary, has reason to believe that any house or premises or enclosure or an open space is used as a common gambling house, he shall be empowered to enter or authorise any Police Officer, not below the rank of a Sub-Inspector to enter with such assistance as may be found necessary, by night or by day, and by force, if necessary, any such house or premises or enclosure or open space and it shall be proper to arrest all persons whom the said Magistrate or the Superintendent or Inspector of Police finds therein or to allow the Police Officer so authorised to arrest such persons whether or not they are actually gambling, and
>
> Seize or authorise the said Officer to seize all instruments of gambling and all moneys and securities for money and valuable articles, reasonably suspected to

have been used or intended to be used for the purpose of gambling and which are found therein, and search or authorise such Police Officer to search all parts of the house or premises or enclosure or open space, which he or such Officer shall have so entered when he or such officer has reason to believe that any instruments of gambling are concealed therein and also the persons whom he or such Officer had so arrested and seize and keep in his possession all such instruments of gambling as are found in the search.

Explanation :.......................... ... .." .

Here the Circle Inspector was an Officer authorised to enter upon and search the premises of the club and therefore his action was fully covered by the section. He effected the arrest of all the persons who were present respondents 1—6 and added to the number the Secretary who although not present on the premises at the time was, according to him, responsible for the offence under section 4 of the Act. Section 7 of the Act then provides, a presumption which the law allows to be drawn from the finding of cards, etc. in a house in which a search according to the terms of section 6 of the Act has taken place That section reads as follows .—

"When any cards or dice or table or other instruments or means of gambling have been found in any house or premises or enclosure or open space entered or searched, in accordance with the provisions of section 6 or have been found with any of the persons therein, it shall be evidence, until the contrary is proved, that such house, premises or enclosure or open space is used as a common gambling house and the persons found therein were present for the purpose of gambling although no play was actually witnessed by the Magistrate or the Police Officer or any of his assistants."

This section gives rise to a presumption from the fact of a search under section 6 after credible information that persons present in the house are there for the purpose of gambling even though no play may be actually witnessed by the raiding party. In the present case, on the appearance of the police, it is admitted, the players stopped their play and the arrests were promptly made of all the persons present round the table who had cards, counters and the money with them.

The learned Magistrate who tried the case was of the opinion that the offence was proved, because of the presumption since it was not successfully repelled on behalf of the present respondents In the order making the reference the learned Sessions Judge made two points He first referred to section 14 of the Act which provides that nothing done under the Act shall apply to any game of mere skill wherever played and he was of opinion on the authority of two cases decided by the Madras High Court and one of the Andhra High Court that the game of Rummy was a game of skill and therefore the Act did not apply to the case He also held that there was no profit made by the members of the club from the charge for the use of cards and the furniture and the room in the club by the players and therefore the definition of 'common gambling house' did not apply to the case In accepting the reference, the learned single Judge in the High Court did not express any opinion upon the question whether the game of Rummy can be described as a game of skill. He relied upon the second part of the proposition which the Sessions Judge had suggested as the ground for acquitting the accused, namely, that the club was not making a profit but was only charging something as a service charge and to this we shall now refer

Mr. Rama Reddy relies, firstly, upon the definition of 'common gambling house' in the Hyderabad Act and contends that in this case there is ample evidence to prove that the club was making a profit or gain from the persons who play Rummy on its premises, pointing out at the same time that the charge was put upon strangers to the club as well as members. He also submits that the presumption which arises under section 7 of the Gambling Act has not been successfully repelled and on the other hand it has been confirmed by the making of this charge by the club.

In support of his case that the club was making a profit or gain from the game of Rummy he draws attention to four matters which in his opinion bring the club

within the said definition The first was a charge of 5 paise per game which according to him was being levied on each game of Rummy. He next points out that playing cards were supplied to the players by the club at an extra charge of Rs. 3 and there was a sitting fee of Re. 1 per person from those who joined the game. He points out further that if the game continued beyond a certain time in the night, a late fee was also levied. In addition, he says, that non-members were also required to pay and, therefore, this club must fall within the definition of a common gambling house. In support he relies upon a decision of the Madras High Court In re, *Somasundaram Chettiar* [1]

In our opinion the points made by Mr Rama Reddy do not prove this club to be a common gambling house. The presumption under section 7, even if it arises in this case, is successfully repelled by the evidence which has been led, even on the side of the prosecution.

To begin with, there is nothing to show that a fee of 5 paise per game was being charged. Only the Sub-Inspector (P.W. 6) deposes to it but there is nothing to show what his source of information was At the time the game was going on, he was not present and when he arrived on the scene, the game had stopped. The account-books of the club do not show any such levy from the persons and in the absence of any entry, we cannot hold this fact to be sufficiently proved. As regards the extra charge for playing cards we may say that clubs usually make an extra charge for anything they supply to their members because it is with the extra payments that the management of the club is carried on and other amenities are provided. It is commonly known that accounts have to be kept, stocks have to be purchased and maintained for the use of the members and service is given. Money is thus collected and there is expenditure for running of each section of the establishment. Just as some fee which is charged for the games of billiards, ping-pong, tennis, etc. an extra charge for playing cards (unless it is extravagant) would not show that the club was making a profit or gain so as to render the club into a common gambling house. Similarly, a late fee is generally charged from members who use the club premises beyond the scheduled time. This is necessary, because the servants of the club who attend on the members have to be paid extra remuneration by way of overtime and expenditure on light and other amenities has to be incurred beyond the club hours. Such a charge is usual in most of the clubs and we can take judicial notice of the fact.

This leaves over for consideration only the sitting fee as it is called. In this connection, the account books of the club have been produced before us and they show that a fee of 50 paise is charged per person playing in the card room. This to our opinion is not such a heavy charge in a Members' Club as to be described as an attempt to make a profit or gain for the club. Of course, if it had been proved that 5 paise per game were charged, that might have been considered as an illegal charge sufficient to bring the club within the definition. As we have already pointed out, the levy of that charge has not been proved. The other charges which the club made do not establish that this was a common gambling house within the definition.

It is submitted by Mr. Ram Reddy that non-members also play and further that the club provides no other amenities besides making it possible for members and non-members to play the game of Rummy on the premises. We think that the evidence on this part is not quite satisfactory. No doubt one witness has stated that Chess is also played, but that does not prove that amenities other than card games are catered for by the club. But on the other side also there is no definite evidence that there is no other amenity in this club but the playing of card games. In these circumstances, to hold that the club does not provide other amenities is tantamount to making a conjecture which is not permissible in a criminal case.

We are also not satisfied that the protection of section 14 is not available in this case. The game of Rummy is not a game entirely of chance like the 'three-

1. (1947) 2 M.L.J. 541 : A.I.R. 1948 Mad. 264.

card' game mentioned in the Madras case to which we were referred. The 'three-card' game which goes under different names such as 'flush', 'brag', etc, is a game of pure chance. Rummy on the other hand, requires certain amount of skill because the fall of the cards has to be memorised and the building up of Rummy requires considerable skill in holding and discarding cards We cannot, therefore, say that the game of Rummy is a game of entire chance It is mainly and preponderantly a game of skill The chance in Rummy is of the same character as the chance in a deal at a game of bridge. In fact in all games in which cards are shuffled and dealt out, there is an element of chance, because the distribution of the cards is not according to any set pattern but is dependent upon how the cards find their place in the shuffled pack. From this alone it cannot be said that Rummy is a game of chance and there is no skill involved in it. Of course, if there is evidence of gambling in some other way or that the owner of the house or the club is making a profit or gain from the game of Rummy or any other game played for stakes, the offence may be brought home. In this case, these elements are missing and therefore we think that the High Court was right in accepting the reference as it did.

The appeal fails and is dismissed.

R.M. *Appeal dismissed.*

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction.)

PRESENT —K N WANCHOO, *Chief Justice*, V BHARGAVA AND G K MITTER, JJ.

Sawan Ram . *Appellant**

v

Mst. Kalawanti and others *Respondents*

Hindu Adoptions and Maintenance Act (LXXVIII of 1956), *sections* 5 (1), 12, 13 *and* 14—*Scope—Adoption to a Hindu—Adoption by a widow—Whether adopted to her husband also—Rights of adopted son—Restriction on his rights under proviso* (c) *to sections* 12 *and* 13—*Effect of*

Hindu Adoptions and Maintenance Act (LXXVIII of 1956), *sections* 6 *(ii) and* 9 (2)—*Adoption deed—Deed clearly mentioning that parents gave the child in adoption—Recitation that mother put her thumb mark in token of her consent—Validity of adoption.*

Adoption is envisaged as being of two kinds (section 5 (1)). One is adoption by a Hindu, and the other is adoption to a Hindu Adoption to a Hindu was intended to cover cases where an adoption is by one person, while the child adopted becomes the adopted son of another person also. It is only in such a case that it can be said that the adoption has been made to that other person.

After a female is married she belongs to the family of her husband. The child adopted by her must also therefore, belong to the same family. On an adoption by a widow the adopted son is deemed to be a member of the family of the deceased husband of the widow. Further still, he loses all his rights to the family of his birth and those rights are replaced by the rights created by the adoption in the adoptive family. The right, which the child had, to succeed to property by virtue of being the son of his natural father, in the family of his birth, is, thus, clearly to be replaced by similar rights in the adoptive family and, consequently, he would certainly obtain those rights in the capacity of a member of that family as an adopted son of the deceased husband of the widow or the married female, taking him in adoption. This provision in section 12 of the Act itself makes it clear that, on adoption by a Hindu female who has been married, the adopted son will, in effect, be the adopted son of her husband also.

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* C A No 728 of 1964 19th April, 1967

By virtue of clause (c) of Proviso to section 12, the Act has narrowed down the rights of an adopted child as compared with the rights of a child born posthumously. Under the Shastric law, if a child was adopted by a widow, he was treated as a natural born child, and consequently he could divest other members of the family of rights vested in them prior to their adoption. It was only with the limited object of avoiding any such consequence on the adoption of a child by a Hindu widow that these provisions in clause (c) of the proviso to section 12, and section 13 of the Act were incorporated. This restriction was placed on the rights of a child adopted by either a male Hindu or a female Hindu and not merely in a case of adoption by a female Hindu. This restriction on the rights of the adopted child cannot lead to any inference that a child adopted by a widow will not be deemed to be the adopted son of her deceased husband.

Held, further, on facts, that the mention of consent cannot be held to show that it was the mother who, in fact, gave the child in adoption and not the father.

Observations in *Hanumantha Rao* v *Hanumayya*, (1964) 1 An.W.R 156, overruled but ultimate decision held correct.

Appeal by Special Leave from the Judgment and Decree, dated the 25th September, 1961 of the Punjab High Court in Civil Regular Second Appeal No. 343 of 1961.

S. K. Mehta and *K. L. Mehta*, Advocates for Appellant

A. D. Mathur, Advocate for Respondents.

The Judgment of the Court was delivered by

Bhargava, J.—One Ramji Dass died leaving behind a widow, Smt Bhagwani. At the time of his death, he owned some land and a house. 4 bighas and 17 biswas of the land were mortgaged by Smt. Bhagwani on 2nd May, 1948 in favour of respondent No 3, Babu Ram. Later, on 22nd August, 1949, she executed a deed of gift in respect of the house and the land covering an area of 50 bighas and 14 biswas in favour of Smt Kalawanti who was related to her as a grand-niece. Sawan Ram appellant instituted a suit for a declaration that both these alienations were without legal necessity and were not binding on him, claiming that he was the nearest reversioner of Ramji Dass, being his collateral. In that suit, Smt. Bhagwani, the donee, Smt. Kalawanti, respondent No. 1, and the mortgagee, Babu Ram, respondent No. 3, were impleaded as defendants. That suit was decreed and Smt Bhagwani went up in appeal to the High Court. During the pendency of the appeal, Smt. Bhagwani adopted respondent No. 2 Deep Chand, the son of Brahmanand and his wife, respondent No. 1, Smt Kalawanti. A deed of adoption was executed by her in that respect on 24th August, 1959. The appeal was dismissed in spite of this adoption.

Smt. Bhagwani died on 31st October, 1959, and thereupon, the appellant brought a suit for possession of the house and the land which had been gifted by Smt. Bhagwani to respondent No 1 as well as for possession of the land which she had mortgaged with respondent No 3. It was claimed that Smt Bhagwani had only a life interest in all these properties, because she had divested herself of all the rights in those properties on 22nd August, 1949, before the Hindu Succession Act, 1956 (XXX of 1956) came into force. The adoption of Deep Chand was also challenged as fictitious and ineffective. It was further urged that, even if that adoption was valid Deep Chand became the adopted son of Smt Bhagwani and could not succeed to the properties of Ramji Dass. The suit was dismissed by the trial Court, holding that the adoption of Deep Chand was valid and that, though Smt Bhagwani had not become the full owner of the property under the Hindu Succession Act, 1956, Deep Chand was entitled to succeed to the property of Ramji Dass in preference to the appellant, so that the appellant, could not claim possession of these properties. That order was upheld by the High Court of Punjab, and the appellant has now come up to this Court in appeal by Special Leave.

In this appeal before us, only two points have been urged by learned Counsel for the appellant The first point taken is that, even though the appellant did not challenge the finding of fact that respondent No. 2 was, in fact, adopted by Smt. Smt. Bhagwani, that adoption was invalid under clause (ii) of section 6 read with sub-section (2) of section 9 of the Hindu Adoptions and Maintenance Act, (LXXVIII of 1956) hereinafter referred to as "the Act"). It is urged that, under section 9 (2) of the Act, if the father of a child is alive, he alone has the right to give in adoption, though the right is not to be exercised, save with the consent of the mother In this case, reliance was placed on the language of the deed of adoption dated 24th August, 1959, to urge that Deep Chand was, in fact, given in adoption to Smt Bhagwani by his mother, respondent No 1, even though his father, Brahmanand, was alive.

This point raised on behalf of the appellant is negatived by the evidence on the record There is oral evidence of the adoption which has been accepted by the lower Courts, and it shows that Deep Chand was given in adoption by both the parents to Smt Bhagwani. Even the deed of adoption dated 24th August, 1959, on which reliance was placed on behalf of the appellant in support of this argument, does not bear out the suggestion that Deep Chand was given in adoption by his mother and not by his father The deed clearly mentions that "the parents of Deep Chand have, of their own free will, given Deep Chand to me, the executant, today as my adopted son" This recitation is followed by a sentence which states : "Mst Kalawanti, mother of Deep Chand, has put her thumb-mark here under in token of her consent." It was from this solitary sentence that inference was sought to be drawn that Deep Chand had been given in adoption by his mother, Kalawanti and not by the father. The deed, in the earlier sentence quoted above, clearly mentions that Deep Chand had been given in adoption by his "parents" which necessarily includes the father. This later sentence, it appears, was put in the deed, because section 9 (2) of the Act mentions that the father is not to exercise his right of giving his child in adoption, save with the consent of the mother. "The consent of the mother" having been used in the Act which was applicable, the draftsmen of the deed included in it the fact that Deep Chand's mother had actually given her consent and obtain her thumb-impression in token thereof This mention of the consent cannot, in these circumstances, be held to show that it was the mother who, in fact, gave the child in adoption and not the father.

The second point and the one, on which reliance is mainly placed by learned Counsel for the appellant is that, according to him, under the Act, an independent right of adoption is given to a Hindu female and if a widow adopts a son, he becomes the adopted son of the widow only and is not to be deemed to be the son of her deceased husband Under the Shastric Hindu Law, no doubt, if a Hindu widow made an adoption after the death of her husband on the basis of consent obtained from him in his life-time, the adopted son was deemed to be the son of the deceased husband also, but it is urged that the Act has completely changed this policy In support of this proposition, learned Counsel drew our attention to the provisions of section 8 of the Act, under which any female Hindu who is of sound mind, who is not a minor, and who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind, has been granted the capacity to take a son or a daughter in adoption Then reference was made to section 12 of the Act, which runs as follows —

"12 An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that—

(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) any property which vested in the adopted child before the adoption shall continue to vest in such peson subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption."

Reliance was also placed on sections 13 and 14 of the Act which are reproduced below:—

"13. Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer *inter vivos* or by will.

14. (1) Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother.

(2) Where an adoption has been made with the consent of more than one wifer the senior most in marriage among them shall be deemed to be the adoptive mothe and the others to be step-mothers.

(3) Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be the step-mother of the adopted child

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step-father of the adopted child".

On the basis of these provisions, it was urged that the scheme of the Act is that, when a Hindu female adopts a child he becomes the adopted son of the Hindu female only and does not necessarily become the son of the deceased husband, if the Hindu female be a widow. Emphasis was laid on the fact that even unmarried female Hindu is permitted to take a son or daughter in adoption and in such a case, naturally, no question would arise of the adopted child becoming the adopted son of a Hindu male also. In this connection, reliance was placed on a division of the High Court of Andhra Pradesh in *Nara Hanumantha Rao* v. *Narra Hanumayya and another*[1]. For convenience, the facts of that case may be briefly reproduced as given in the head-note to indicate the question of law that fell to be decided *A* and his two sons *B* and *C* were members of a Hindu joint family. *B* died on 26th August, 1924, leaving behind his widow *D*. *A* died in the year 1936. On 17th June 1957, *D* adopted *E* and *E* filed the suit against *C* and his son *F* for partition and separate possession of a half share in the properties. The trial Court held (1) that there is a custom among the members of the Kamma caste, to which the parties belonged, whereby the adoption of a boy more than 15 years old is valid. and (2) that the adoption of *E* could not have the result of divesting the interest of *B* that had vested in *C* long prior to the date of the adoption, having regard to the provisions of the Act In appeal, the High Court upheld the decision of the Trial Court on both the points that were raised. The existence of the caste custom, by which boys aged more than 15 years could be adopted, was held to be sufficiently proved by evidence

Then the High Court proceeded to consider the provisions of the Act to find out whether *E* could claim a share in the property of *B*, the deceased husband of *D* who had adopted him. The learned Judges of the High Court enumerated the contents of the various relevant sections of the Act and then proceeded to consider whether *E* could claim a right in the property left by *B*. The Court, after reproducing the provisions of section 12 of the Act held:

"Under the terms of the above section, an adopted child is deemed to be the child of his or her adoptive father or mother for all purposes with effect from the

1 (1964) 1 An W R 156

date of the adoption. Relying on the words "for all purposes", it is argued that the adopted child has the same rights and privileges in the family of the adopter as the legitimate child. From the language of the section, it is manifest that an adopted child is deemed to be the child of his or her adoptive father or mother The use of the word "or" between the words "father" and "mother" makes this abundantly clear. The use of the expression "with effect from the date of adoption" as also the language of clause (c) of the Proviso are important. The expression "with effect from the date of adoption" introduces a vital change in the pre-existing law. Under the law as it stood before the Act came into operation, the ground on which an adopted son was held entitled to take in defeasance of the rights acquired prior to his adoption was that, in the eye of law, his adoption related back, by a legal fiction, to the date of death of his adoptive father. The rights of the adopted son, which were rested on the theory of "relation back," can no longer be claimed by him This is clear from the specific provision made in section 12 that the rights of the adoptee are to be determined with effect from the date of adoption Clause (c) of the Proviso to section 12 lays down the explicit rule that the adoption of a son or daughter by a male or female Hindu is not to result in the divesting of *any estate vested in any person* prior to the adoption."

When finally expressing its opinion on the question of law, the Court said :—

"The Act has made a notable departure from the previous law in allowing a widow to adopt a son or daughter to herself in her own right Under the Act, there is no question of the adopted child divesting of any property vested in any person or even in herself The provisions of section 13 make this position clear, by providing that an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer *inter vivos* or by will..... On a fair interpretation of the provisions of section 12 of the Act, we are of the opinion that the section has the effect of abrogating ordinary rule of Mitakshara law that, as a result of the adoption made by the widow, the adoptee acquires rights to the share of his deceased adoptive father which has passed by survivorship to his father's brothers."

We are unable to accept this interpretation of the provisions of the Act by the Andhra Pradesh High Court as it appears to us that the High Court ignored two important provisions of the Act and did not consider their effect when arriving at its decision. The first provision, which is of great significance, is contained in section 5 (1) of the Act which lays down :

"No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter and any adoption made in contravention of the said provisions shall be void."

It is significant that, in this section, the adoption to be made is mentiond as "by or to a Hindu". Thus, adoption is envisaged as being of two kinds. One is adoption by a Hindu, and the other is adoption to a Hindu. If the view canvassed on behalf of the appellant be accepted, the consequence will be that there will be only adoptions by Hindus and not to Hindus. On the face of it, adoption to a Hindu was intended to cover cases where an adoption is by one person, while the child adopted becomes the adopted son of another person also. It is only in such a case that it can be said that the adoption has been made to that other person. The most common instance will naturally be that of adoption by a female Hindu who is married and whose husband is dead, or has completely and finally renounced the world, or has been declared by a Court of competent jurisdiction to be of unsound mind. In such a case, the actual adoption would be by the female Hindu, while the adoption will be not only to herself, but also to her husband who is dead, or has completely and finally renounced the world or has been declared to be of unsound mind.

The second provision, which was ignored by the Andhra Pradesh High Court, is one contained in section 12 itself The section, in its principal clause, not only

lays down that the adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption, but, in addition, goes on to define the rights of such an adopted child. It lays down that from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family. A question naturally arises what is the adoptive family of a child who is adopted by a widow, or by a married woman whose husband has completely and finally renounced the world or has been declared to be of unsound mind even though alive. It is well recognised that, after a female is married, she belongs to the family of her husband. The child adopted by her must also, therefore, belong to the same family. On adoption by a widow, therefore, the adopted son is to be deemed to be a member of the family of the deceased husband of the widow Further still, he loses all his rights in the family of his birth and those rights are replaced by the rights created by the adoption in the adoptive family The right, which the child had, to succeed to property by virtue of being the son of his natural father, in the family of his birth, is, thus, clearly to be replaced by similar rights in the adoptive family and, consequently, he would certainly obtain those rights in the capacity of a member of that family as an adopted son of the deceased husband of the widow, or the married female, taking him in adoption This provision in section 12 of the Act, thus, itself makes it clear that, on adoption by a Hindu female who has been married, the adopted son will, in effect, be the adopted son of her husband also This aspect was ignored by the Andhra Pradesh High Court when dealing with the effect of the language used in other parts of this section

It may, however, be mentioned that the conclusion which we have arrived at does not indicate that the ultimate decision given by the Andhra Pradesh High Court was in any way incorrect As we have mentioned earlier, the question in that case was whether *E*, after the adoption by *D*, the widow of *B*, could divest *C* of the rights which had already vested in *C* before the adoption It is significant that by the year 1936 *C* was the sole male member of the Hindu joint family which owned the disputed property, *B* died in the year 1924 and *A* died in 1936 By that time, the Hindu Women's Rights to Property Act had not been enacted and, consequently, *C* as the sole male survivor of the family, became fully owner of that property In these circumstances, it was clear that after the adoption of *E* by *D*, *E* could not divest *C* of the rights already vested in him in view of the special provision contained clause (*c*) of the proviso to section 12 of the Act It appears that, by making such a provision, the Act has narrowed down the rights of an adopted child as compared with the rights of a child born posthumously. Under the Shastric law, if a child was adopted by a widow, he was treated as a natural-born child and, consequently, he could divest other members of the family of rights vested in them prior to his adoption. It was only with the limited object of avoiding any such consequence on the adoption of a child by a Hindu widow that these provisions in clause (*c*) of the proviso to section 12, and section 13 of the Act were incorporated In that respect, the rights of the adopted child were restricted It is to be noted that this restriction was placed on the rights of a child adopted by either a male Hindu or a female Hindu and not merely in a case of adoption by a female Hindu This restriction on the rights of the adopted child cannot, therefore, in our opinion, lead to any inference that a child adopted by a widow will not be deemed to be the adopted son of her deceased husband The second ground taken on behalf of the appellant also, therefore, fails

The appeal is, consequently, dismissed with costs

S V J *Appeal dismissed*

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THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction.)

PRESENT :—K. N WANCHOO, *Chief Justice*, R S. BACHAWAT AND G. K. MITTER, JJ.

Boddu Venkatakrishna Rao and others . *Appellants**

v.

Srimati Boddu Satyavathi and others .. *Respondents.*

Wills—Interpretation of—Property bequeathed to two persons jointly—Legatees—If would take the same as 'joint tenants' or 'tenants in common'.

The principle of joint tenancy is unknown to Hindu Law except in the case of coparcenary between the members of an undivided family. Hence it is not right to import into the construction of a will by a Hindu the technicalities of English conveyancing.

Where the clause in the will provided " that the entire property should be in possession of both of them and that both of them should enjoy throughout their life-time the said property. ....and that after their death the children that may be born to them should enjoy the same........" it cannot be said that the donees under the will took the estate as joint tenants. The clause does not expressly mention that on the death of one all the properties would pass to the other by right of survivorship, which will be the normal incident of joint tenancy. The donees in the circumstance are only tenants in common and are entitled to partition the property among themselves. The heirs of the donees under the will take the vested remainder *per stirpes* and not *per capita*

Where a testator gives the income of his estate to two people for their lives and follows that gift by a direction that at their death the property is to go to their issue, the Court does not construe the gift as a gift only to take effect on the death of both in favour of the issues of both, but construes it as a gift, to take effect on the death of each of the share to the income of which the deceased was entitled to the issue of the deceased.

Errington In re: Gibbs v *Lassam*, L R. (1927) 1 Ch. D. 421; *Macdonnell* v. *Neil*, L.R. (1951) A.C. 342, Referred.

Appeal by Special Leave from the Judgment and Order dated the 31st October, 1962 of the Andhra Pradesh High Court in Appeal No. 563 of 1959.

K. R. Chaudhuri, Advocate, for Appellants.

A. K. Sen, Senior Advocate (*T. Satyanarayana*, Advocate with him), for Respondents 1 to 3.

The Judgment of the Court was delivered by :

Mitter, J—This is an appeal by Special Leave from a Judgment and decree of the High Court of Andhra Pradesh confirming the decree passed by the Subordinate Judge at Eluru in O.S No. 112 of 1955 The only question involved in this appeal is, whether, under the terms of the will of one Boddu Adilakshmi, defendants 4 and 5 took her properties as joint tenants or tenants in common.

The facts leading to the litigation may be stated as follows The testatrix, Adilakshmi, who was childless herself brought up defendants 4 and 5, Boddu Ramarao and Kosury Lakshmamma, from their infancy. At the date of the will executed on 28th June, 1913 the girl (defendant 5) had been with her for 15 years and the boy (defendant 4) for 10 years and both were minors at the time In order to provide for them after her death she executed a will covering all her properties, movable and immovable The translation of the relevant portion of the will which was in vernacular is as follows.—

" . .... .my entire property should hereafter my lifetime pass to both these minors, Lakshmamma and Ramarao, that until their minority period is over,

* C.A No. 245 of 1965. 23rd November, 1967.

Banda Ramaswamy Garu. . . should act as their guardian and deal with all the affairs that after their minority period is over the entire property should be in possession of both of them, that both of them should enjoy throughout their lifetime the said property without powers of gift, transfer and sale and that after their death the children that may be born to them should enjoy the same with powers of gift,transfer and sale"

The testatrix died within a few days after the execution of the will. Defendants 4 and 5 divided the properties left by the testatrix by a registered partition deed dated 27th December, 1929 by which those mentioned in Schedule A to the plaint fell to the share of the 4th defendant while the others mentioned in Schedule B felt to the share of the 5th defendant. The 4th defendant married the 1st defendant, Boddu Satyavathi who is the daughter of the 5th defendant. The 2nd defendant is the daughter born out of this wedlock. Some years thereafter, the 4th defendant married one Boddu Manikyam, the plaintiffs 1 to 4 being the issues of the marriage of the 4th defendant with her. The 5th defendant and the 1st defendant mortgaged the B Schedule properties with the 3rd defendant who brought a suit on the mortgage and obtained a decree The plaintiffs filed the suit against all the defendants in 1955 praying for a declaration that after the death of defendants 4 and 5, the 1st defendant and the children of the 4th defendant or such of them as may be alive at the time would be entitled to share the properties in suit equally between them and that any alienation made by defendants 4 and 5 or their assignees or alienees would not bind the interests of the ultimate reversioners beyond their lifetime and further that the mortgage decree mentioned above was not binding on the plaintiffs or the ultimate reversioners In the trial Court a number of issues were framed but the only question canvassed before the High Court on appeal related to the effect of the will of Adilakshmi The trial Court came to the conclusion that defendants 4 and 5 were only the holders of life estate and that they had succeeded to the estate of Adilakshmi as tenants in common. The High Court held that:

> "the right of the children of defendants 4 and 5 to step into the shoes of the parents has been expressly mentioned in the instrument. The residuary estate has been given to the children that may be born to the legatees who it is provided, should enjoy the properties with powers of gift, transfer and sale. A life estate has been given to defendants 4 and 5 and an absolute estate to their children. On a fair construction of the language, it is difficult to accede to the contention of the appellants that the children of defendants 4 and 5 who may be actually alive at the time of the death of defendants 4 and 5, would take the properties *per capita*."

The High Court further held that the conduct of the defendants in partitioning the properties went to fortify the above conclusion The ultimate conclusion of the High Court was:

> "the bequest in favour of defendants 4 and 5 was that of a life estate with a vested remainder in favour of their children and that the children should take the vested remainder *per stirpes* and not *per capita*"

In our view, the High Court came to the correct conclusion Before examining the principles of law involved, we may consider the intention of the testatrix in giving her properties to defendants 4 and 5. She brought them up like her own children but she did not want them to have the power of sale or alienation and desired that the properties be preserved for the benefit of their children It would be reasonable therefore for her to make provision in such a way that the foster children would enjoy the income of the properties for their lives and that their children should inherit the properties as full owners on the death of their parents. The donees of the life estate were minors on the date of the will and there was no knowing when they would get married and how many children each would have. It would therefore be reasonable to expect that the testatrix would so arrange her affairs that each of the foster children should get half of the income of the property for life and that their children should succeed to the respective interest of their parents. It is hardly likely that the testatrix would know the difference between joint tenants and tenants

in common and she would naturally be eager to treat the foster children as her own children so that the heirs of the foster children would take share and share alike the properties being divided *per stirpes* among them.

Let us now consider the position in law The law has been summarised in Mulla's Transfer of Property Act (Fifth Edition) at page 226 As early as 1896 it was held by the Judicial Committee of the Privy Council in *Jogeswar Narain Deo* v. *Ram Chund Dutt and others*[1], that,

> " The principle of joint tenancy appears to be unknown to Hindu law, except in the case of coparcenary between the members of an undivided family."

and that it was not right to import into the construction of a Hindu will an extremely technical rule of English conveyancing. Many years later the principle was reiterated in the case of *Bahu Ram* v. *Rajendra Baksh Singh* [2].

It was argued before us that there were indications in the will that the intention of the testatrix was that the foster children should take as joint tenants and that this was apparent from the clause in the will which provided that

> " the entire property should be in possession of both of them and that both of them should enjoy throughout their lifetime the said property.......... and that after their death the children that may be born to them should enjoy the same........"

We do not think that from this one can spell out a joint tenancy which is unknown to Hindu law except as above stated. The testatrix did not expressly mention that on the death of one all the properties would pass to the other by right of survivorship. We have no doubt on a construction of the will that the testatrix never intended the foster children to take the property as joint tenants. The foster children who became tenants in common partitioned the property in exercise of their right

As by the will the foster children were to have a life interest with a vested remainder to their children, the latter could only take *per stirpes* and not *per capita*. As Halsbury points out (Volume 39, Third Edition) at page 1106, Article 1638 that a stirpital distribution would be adopted.

> " where the gift was to a number of parents and their children in such a manner that the children were substituted for, or took on the death of, their respective parents ; and gifts to several parents and at, or after, their deaths to their children, or to their issue, have received this construction as meaning at or after their respective deaths."

It is not necessary to cite many instances where this construction has been adopted. In re *Hutchinson's Trusts*[3], the testatrix bequeathed personality in trust for A.B. for life and after his decease for his issue, and on failure of his issue to F.H.S. and R S. share and share alike, and after the decease of the said F H.S and R. S. to their children share and share alike, and to their heirs for ever. Kay, J., felt that he was bound by authority to say that the words

> "after the decease of the said 'Francis Hutchinson Synge and his brother Robert Synge' mean after their respective deaths, or after the decease of each of them, and that there is a disposition of the share of each which was an absolute interest in the first instance upon his death." (*See* at page 816.).

This rule was further amplified by Romer, J., in *Errington, In re. Gibbs* v. *Lassam*[4] where he said (at page 425):

> " The rule, stated in its simplest way is this · Where a testator gives the income of his estate to two people, *A* and *B*, for their lives and follows that gift by a direction that at their death or at their deaths, or at or after the death or deaths

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1. (1896) L R 23 I A 37 at 44 6 M L J 75
2. (1933) L R 60 I A 95 at 101 : 64 M L J. 555.
3. 21 Ch D 811.
4. L.R (1927) 1 Ch D 421

of *A* and *B*, the property is to go to their issue, the Court does not construe the gift as a gift only to take effect on the death of both in favour of the issue of both, but construes it as a gift, to take effect on the death of each, of the share to the income of which the deceased was entitled, to the issue of the deceased."

In *Mcdonnell* v. *Neil*[2] the Judicial Committee referred to the dictum of Kay, J, in re *Hutchinson's Trusts*[3] and observed that the construction was borne out by a long line of authority.

In the result, the appeal will stand dismissed with costs The appellant must pay the Court-fees.

R.M. ——— *Appeal dismissed*

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction.)

PRESENT.—J. C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.

M/s. Sri Tirumala Venkateswara Timber and Bamboo Firm .. *Appellant**

v.

The Commercial Tax Officer, Rajahmundry .. *Respondent.*

Andhra Pradesh General Sales Tax Act (*VI of* 1957), *section* 2 (1) (*n*), Explanation III—*Object, effect and validity of—Whether* ultra vires the *State Legislature—Contract of sale and contract of agency—Distinction between*

Constitution of India (1950), *Article* 14—*Andhra Pradesh General Sales Tax Act* (*VI of* 1957), *section* 2 (1) (*n*), Explanation *III—Whether violative of Article* 14.

Constitution of India (1950), *Article* 226—*Whether transaction is sale or contract of agency is a mixed question of law and fact—Determination of in writ application*

Sales of Goods Act (*III of* 1930), *section* 4—*See Andhra Pradesh General Sales Tax Act* (*VI of* 1957).

The real object of the *Explanation* is to prevent the misuse by the assessee of the relationship of principal and agent for the purpose of evading tax.

The real effect of the *Third Explanation* is to impose the tax only when there was a transfer of title to the goods and not where there is mere contract of agency. The *Explanation* says in effect that when there is in reality a transfer of property by the principal to the agent and by the agent in his turn to the buyer, there are two transactions of sale. The phrase "when the goods are transferred" in clauses (1) and (2) of *Explanation III* on a proper construction means "when title to the goods is transferred" and so construed it is impossible to say that the *Explanation* enlarges the scope of the main section. It is necessary for constituting a sale that there should be an agreement between the parties for the purpose of transferring title in the goods, that the agreement must be supported by money consideration and that as a result of the transaction the title to the property must actually pass in the goods.

As a matter of law there is a distinction between a contract of sale and a contract of agency by which the agent is authorised to sell or buy on behalf of the principal and make over either the sale proceeds or the goods to the principal. The essence of a contract of sale is the transfer of title to the goods for a price paid or promised to be paid The transferee in such a case is liable to the transferor as a debtor for the price to be paid and not as agent for the proceeds of the sale The essence of agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal who continues to be the owner of the goods and will therefore be liable to account for the sale proceeds The true relationship of the parties in each case

1. L.R. (1951) A.C. 342 2 21 Ch D 811

* C.A No. 2176 of 1966. 28th November, 1967.

has to be gathered from the nature of the contract, its terms and conditions, and the terminology used by the parties is not decisive of the legal relationship.

The question as to whether the transactions in the case are sales or contracts of agency is a mixed question of fact and law and must be investigated with reference to the material which the dealer might be able to place before the appropriate authority. The question is not one which can properly be determined in an application for a writ under Article 226 of the Constitution.

The *Third Explanation* to section 2 (1) (*n*) of the Act is not violative of Article 14 of the Constitution as the classification is based upon an intelligible differentia and has a rational relationship with the object sought to be achieved by the statute.

Appeal from the Judgment and Order dated the 16th April, 1964 of the Andhra Pradesh High Court in Writ Petition No 1404 of 1963

P. Parameswara Rao, Advocate for *R. V. Pillai*, Advocate, for Appellant

P. Ram Reddy, Senior Advocate (*A. V. V Nair*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J.—The appellant is a partnership firm carrying on business in bamboos, timber and firewood at Gokavaram in the State of Andhra Pradesh. The firm had been registered as a dealer under the Andhra Pradesh General Sales Tax Act (VI of 1957), hereinafter referred to as the 'Act' For the assessment year 1962-63, the appellant submitted a return showing a gross turnover of Rs. 13,89,130-70 P. and claimed exemption on a turnover of Rs 13,68,174-39 P. which according to the appellant represented the amount of sales effected by its commission agents and sales of firewood. By a notice, dated 28th November, 1963, the Commercial Tax Officer, Rajahmundry called upon the appellant to show cause as to why it should not be assessed for the year 1962-63 on a turnover of Rs. 13,89,130-70P. at 2 per cent. Eleven items were comprised in the notice. Item No. 1, relating to a turnover of Rs 96,527-10 P was under the firewood account. It was alleged by the appellant that it paid the single point tax at 2 per cent. to the Forest Department on the amounts for which the forest goods were taken in auction. As regards items 2 to 11, the appellant claimed exemption on the ground that its agents, Messrs Kusuma Arjayya and Batlanki Veera Venkayya, Rajahmundry, paid the tax. The case of the appellant was that it sent goods for sale to its commission agents and under the contract of agency the commission agents were empowered to pay sales tax and had paid the same directly to the Sales Tax Department. In accordance with the usual commercial practice the commission agents collected Dharmam on the sales conducted by them and appropriated those collections for charitable purposes. The commission agents furnished accounts to the appellant but in these accounts the amounts collected towards sales tax and Dharmam were not specifically shown as it was understood between the parties that the amounts collected towards sales tax would be remitted to the Sales Tax Department and the amounts collected towards Dharmam would be credited to the charity account of the commission agents and suitably utilised by them Aggrieved by the assessment notice of the respondent disallowing its claim for exemption, the appellant-firm filed a Writ Petition No. 1404 of 1963, dated 7th December, 1963 before the High Court of Andhra Pradesh under Article 226 of the Constitution praying for the grant of a writ in the nature of *certiorari* calling for the records relating to sales tax assessments of the appellant for the year 1962-63 and quashing the notice, dated 28th November, 1963 issued by the respondent By its judgment, dated 16th April, 1964 the High Court dismissed the writ petition. This appeal is brought by a certificate granted by the High Court.

On behalf of the appellant it was contended, in the first place, that *Explanation III* to section 2 (1) (*n*) of the Act enlarged the scope of the word "sale" and by means of a fiction converted what are not sales in law into taxable sales for the

purpose of the Act and, therefore, the Explanation was *ultra vires* of the powers of the State Legislature which had no legislative competence to impose a tax under Entry 48 in List II of Schedule VII of the Constitution. Section 2 (1) (*n*) of the Act defines " sale " as follows :

" 'sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business, for cash, or for deferred payment, or for any other valuable consideration, (and includes any transfer of materials for money consideration in the execution of a works contract provided that the contract for the transfer of such materials can be separated from the contract for the services and the work done, although the two contracts are embodied in a single document) or in the supply or distribution of goods by a society (including a co-operative society) club, firm or association to its members, but does not include a mortgage, hypothecation or pledge of, or a charge on goods,

Note—By Amendment Act (XXVI of 1961), the bracketed words were substituted for the words ' and includes a transfer of property in goods involved in the execution of a works contract'.

....

Explanation III.—Notwithstanding anything contained in this Act or in the Indian Sale of Goods Act, 1930 (Central Act III of 1930), two independent sales or purchases shall, for the purposes of this Act, be deemed to have taken place—

(1) when the goods are transferred from a principal to his selling agent and from the selling agent to the purchaser, or

(2) when the goods are transferred from the seller to a buying agent and from the buying agent to his principal, if the agent is found in either of the cases aforesaid—

(*i*) to have sold the goods at one rate and to have passed on the sale proceeds to his principal at another rate; or

(*ii*) to have purchased the goods at one rate and to have passed them on to his principal at another rate, or

(*iii*) not to have accounted to his principal for the entire collections or deductions made by him, in the sales or purchases effected by him on behalf of his principal, or

(*iv*) to have acted for a fictitious or non-existent principal,".

In our opinion the real object of the Explanation is to prevent the misuse by the assessee of the relationship of principal and agent for the purpose of evading tax The first situation contemplated by the Legislature is that covered by clause 2 (*i*) of *Explanation III* where the agent has sold the goods at one rate and passed on the sale proceeds to its principal at another rate. The second situation is where the agent has purchased the goods at one rate and has passed them on to the principal at another rate. The third situation is where the agent has not accounted to his principal for the entire collections or deductions made by him in the sales or purchases effected by him on behalf of his principal, and the fourth is where it appears that the agent has acted for a fictitious or non-existent principal It was contended on behalf of the appellant that the State Legislature was not competent to convert by a legal fiction a mere entrustment of goods for sale into a sale and to impose a tax thereon In our opinion, there is no warrant for this argument. The real effect of the third *Explanation* is to impose the tax only when there was a transfer of title to the goods and not where there is a mere contract of agency. The Explanation says in effect that where there is in reality a transfer of property by the principal to the agent and by the agent in his turn to the buyer, there are two transactions of sale In our opinion, the phrase, " when the goods are transferred " in clauses (1) and (2) of *Explanation III* on a proper construction means " when title to the goods is transferred " and so construed it is impossible to say

that the Explanation enlarges the scope of the main section It was pointed out by this Court in *The State of Madras* v *Gannon Dunkerley & Co (Madras) Ltd* [1], that the expression "sale of goods" in Entry 48 in List II of Schedule VII of the Government of India Act, 1935, cannot be construed in its popular sense but must be interpreted in its legal sense and should be given the same meaning which it has in the Sale of Goods Act, 1930. It is a *nomen juris* its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In other words, it is necessary for constituting a sale that there should be an agreement between the parties for the purpose of transferring title in the goods, that the agreement must be supported by money consideration and that as a result of the transaction the title to the property must actually pass in the goods. As we have already pointed out, the *third Explanation* to section 2 (1) (*n*) of the Act must be interpreted to mean that where there is in reality a transfer of property in the goods by the principal to the agent and by the agent in his turn to the buyer, there are two transactions of sale It is therefore impossible to accept the contention put forward on behalf of the appellant that the Explanation has converted what, in fact, is not a sale into a sale for the purpose of assessment to sales tax.

It was contended on behalf of the appellant that in any event Items Nos. 2 to 11 of the notice related to goods which the appellant had sent for sale to the commission agents and as the latter had already paid the sales tax the appellant was not liable to be assessed to tax again on the same transaction as there was only one sale. As a matter of law there is a distinction between a contract of sale and a contract of agency by which the agent is authorised to sell or buy on behalf of the principal and make over either the sale proceeds or the goods to the principal The essence of a contract of sale is the transfer of title to the goods for a price paid or promised to be paid. The transferee in such a case is liable to the transferor as a debtor for the price to be paid and not as agent for the proceeds of the sale The essence of agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal who continues to be the owner of the goods and will therefore be liable to account for the sale proceeds. The true relationship of the parties in each case has to be gathered from the nature of the contract, its terms and conditions, and the terminology used by the parties is not decisive of the legal relationship. For instance, in *W T Lamb and Sons* v *Goring Brick Company, Ltd.*[2], there was an agreement in writing by which certain manufacturers of bricks and other building materials appointed a firm of builders' merchants "sole-selling agents of all bricks and other materials manufactured at their works." The agreement was expressed to be for three years and afterwards continuous subject to twelve months' notice by either party. While the agreement was in force the manufacturers informed the merchants that they intended in the future to sell their goods themselves without the intervention of any agent, and thereafter they effected sales to customers directly. It was held by the Court of Appeal that the agreement was one of vendor and purchaser and not one of principal and agent. The same principle is enunciated in *Hutton* v *Lippert*[3], in which there was a contract between the defendant and *E* which in its terms purported to be one of guarantee or agency, that is to say, the defendant guaranteed the sale of *E*'s property in whole or by lots at a fixed price, *E* giving the defendant a power-of-attorney to deal with the property as he thought fit, and agreeing that he should receive any surplus over and above the fixed price as his commission on and recompense for the said guarantee It was held by the Judicial Committee, upon a construction of the agreement, that the transaction was really a sale and that the defendant was liable to pay duty on his purchase-money under Act (II of 1863). At page 313 of the Report, Sir Robert P Collier, who delivered the opinion of the Board, stated as follows .—

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1 (1958) S C J 696 (1959) S C R 379 (1958) 2 An W R (S C) 66 (1958) 2 M L J (S C) 66 . (1958) 9 S T C 353.

2 L R (1932) K B 710

3 L R (1883) 8 A C 309.

"Under these circumstances it appears to their Lordships that the Chief Justice was justified in saying that the effect of the transaction was to give Ekstein every right which a vendor could legally claim, and to confer upon the defendant every right which a purchaser could legally demand. Does it make any difference that the parties have called this transaction by the name of a guarantee? It appears to their Lordships that because the parties have used this term 'guarantee' in a sense which is unusual and not applicable to this case,—for Lippert really guaranteed nothing,—the nature of the transaction is not thereby changed; and because they have said that Lippert was to be entitled to whatever surplus or balance shall remain on the resale of portions of the property, if any were resold, 'as commission and recompense for the said guarantee,' this expression does not convert him from a purchaser into an agent"

It is manifest that the question as to whether the transactions in the present case are sales or contracts of agency is a mixed question of fact and law and must be investigated with reference to the material which the appellant might be able to place before the appropriate authority The question is not one which can properly be determined in an application for a writ under Article 226 of the Constitution.

It was also submitted on behalf of the appellant that the *third Explanation* to section 2 (1) (*n*) of the Act violated the guarantee under Article 14 of the Constitution since the classification contemplated, *i e*, sales through commission agents who account fully for all collections made and sales through commission agents who do not account for collections, was not made on any intelligible differentia and had no rational relationship to the purpose of the statute. In our opinion, there is no substance in this argument as the classification is based upon an intelligible differentia and it has a rational relationship with the object sought to be achieved by the statute. Counsel for the appellant is therefore unable to make good his submission on this aspect of the case.

For the reasons expressed we hold that the judgment of the High Court of Andhra Pradesh is right and this appeal must be dismissed. In the circumstances of the case we do not propose to make any order as to costs.

S.V.J. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—J. C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.

The Deputy Commercial Tax Officer, Saidapet Madras and another .. *Appellants**

v.

The Enfield India Ltd Co-operative Canteen Ltd. .. *Respondents.*

Constitution of India (1950), *Schedule* 7, *List II*, *Entry* 54—"*Sale of goods*"—*Meaning of—Elements of transfer of property lacking in any transaction—Competency of Legislature to impose tax.*

Madras General Sales Tax Act (*I of* 1959), *section* 2 (d), 2 (g), Explanation 2 (n) *and section* 3—*Madras Co-operative Societies Act* (*VI of* 1932)—*Co-operative society supplying to its members refreshment for price—No profit-motive—Whether dealer within section* 2 (g)—*Whether* Explanation *to* 2 (g) ultra vires *the State Legislature —Property in refreshments vested in the society—Whether transaction amounts to sale and if so taxable.*

The expression "sale of goods" used in the legislative entries in the Constitution and the Government of India Act, 1935, bears the same meaning which it has in the Sale of Goods Act, 1930, and therefore the State Legislature may

* C. As. Nos 737 to 739 of 1966 23rd November, 1967

under Entry 54, List II, legislate in respect of the series of Acts beginning with an agreement of sale between parties competent to contract and resulting in transfer of property from one of the parties to the agreement to the other for a price, and matters incidental thereto, but cannot make a transaction which is not a sale within the Sale of Goods Act a sale by a statutory fiction and impose tax thereon. Consequently, if the element of transfer of property from one person to another is lacking in any transaction, there is no sale and the Legislature cannot, by treating it as a sale by a deeming clause, bring it within the ambit of the taxing statute.

A scheme for supplying goods to its members by a society for price may partake of the activity of the nature of adventure or concern in the nature of trade, even if the activity is not actuated by a profit-motive The society which has according to its object of incorporation made arrangements for the supply and distribution of refreshments to its members without a profit-motive may be regarded as carrying on trade and would on that account fall within the definition of 'a dealer' within the meaning of section 2 (*g*) A co-operative society registered under the Madras Co-operative Societies Act (VI of 1932) which carries on the business of supplying goods to its members for cash or deferred payments falls within the definition of 'dealer' in section 2 (*g*) The *Explanation* to section 2 (*g*) was not intended to overlap the limits of legislative power By the Explanation the State Legislature has merely clarified that a taxable entity will be regarded as a dealer within the meaning of the Act even though it buys, sells, supplies or distributes goods from or to its members, whether in the course of business or not; it is not intended by the Explanation to declare all transactions of the taxable entity with its members to be transactions of sale or purchase. The Explanation is a part of the definition of "dealer" and not of "sale" For the purpose of levying sales tax it was open to the Legislature to devise a definition of the word 'dealer' and further to provide that certain bodies shall be deemed to be dealers within the meaning of the Act. Therefore *Explanation* to section 2 (*g*) is not *ultra vires* of the Constitution.

For a turnover from a transaction to be taxable under the Act, the transactions must have constituent elements, *viz*, (1) parties competent to contract; (2) mutual assent, (3) thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) price in money paid or promised When a co-operative society supplies to its members for a price refreshment in the canteen maintained by it the four constituent elements of sale are normally present; the parties are competent to contract; there is mutual assent; refreshments which belonged absolutely to the society stands transferred to the buyer and the price is either paid or promised.

From the mere fact that the society supplies refreshment to its members only and claims to make no profit, it cannot be inferred that in preparing refreshments and making them available to its members it is acting as an agent of the members Nor can it be said that the society is holding its property including refreshments prepared by it for supply to its members as a trustee for its members A registered society is a body corporate with power to hold property and is capable of entering into contracts It cannot be assumed that property which it holds is property of which its members are owners The property in law is the property of the society The question being one of liability under the taxing statute, the Court in determining the liability of the society to pay tax cannot ignore the form and look at what is called the "substance of the transaction" *Ex facie*, the transaction is one in which the legal owner of property transfers it to another pursuant to a contract for a price, and that transaction must be regarded as sale. It cannot be urged as a proposition of law that when a co-operative society supplies to its members refreshments for a price under a scheme for distribution or supply of refreshments, the transaction can in no event be regarded as a sale of the refreshments supplied for a price.

Explanation to section 2 (*g*) of the Act is not *ultra vires* the Legislature.

Y. M I A (Regd), Madras v. *Joint Commercial Tax Officer*, (1963) 14 S.T C. 1030, overruled.

Appeals by Special Leave from the Judgment and Order the 21st October, 1964 of the Madras High Court in Writ Appeals Nos 289 to 291 of 1964

A. K. Sen, Senior Advocate (*A. V Rangam*, Advocate, with him), for Appellants (In all the Appeals).

K. R. Chaudhuri, Advocate, for Respondent (In all the Appeals).

The Judgment of the Court was delivered by

Shah, J—The Enfield India Ltd. Co-operative Canteen Ltd, respondent herein was registered as a Co-operative Society under the Madras Co-operative Societies Act (VI of 1932). The object of the Society was to provide a canteen for the employees of Enfield India Ltd The Society was assessed by the Deputy Commercial Tax Officer to pay sales tax for the years 1959-60 and 1960-61 on its turnover from refreshments supplied to its members. The respondent-Society then moved in the High Court of Judicature at Madras three petitions under Article 226 of the Constitution for orders quashing the proceedings of the Deputy Commercial Tax Officer, Saidapet assessing the Society to sales tax in respect of its transactions. Srinivasan, J, following a decision of the Madras High Court: *Young Men's Indian Association (Regd), Madras and another* v. *Joint Commercial Tax Officer, Harbour Division II, Madras and another*[1], quashed the orders of assessment. In appeal to the High Court, the orders passed by Srinivasan, J, were confirmed. With Special Leave, the Deputy Commercial Tax Officer has appealed to this Court.

Section 3 of the Madras General Sales Tax Act (I of 1959) makes every dealer whose total turnover for a year is not less than ten thousand rupees, and every casual trader or agent of a non-resident dealer, whatever be his turnover for the year, liable to pay a tax for each year at the rate of two per cent. of his taxable turnover. ' Dealer ' is defined in section 2 (*g*) as meaning—

" any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, and includes—

* * * * *

Explanation—A society (including a co-operative society), club or firm or an association which whether or not in the course of business, buys, sells, supplies or distributes goods from or to its members for cash or for deferred payment, or for commission, remuneration or other valuable consideration, shall be deemed to be a dealer for the purposes of this Act;"

Clause (*n*) of section 2 defines ' sale '.

" 'sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of business for cash or for deferred payment or other valuable consideration, and includes a transfer of property in goods involved in the execution of a works contract, but does not include a mortgage, hypothecation, charge or pledge;

Explanation (1)—The transfer of property involved in the supply or distribution of goods by a society (including a co-operative society), club, firm, or any association to its members, for cash, or for deferred payment, or other valuable consideration, whether or not in the course of business shall be deemed to be a sale for the purposes of this Act

Explanation (2)— * * * *

Explanation (3)— * * * *

Explanation (4)— * * * *"

" Turnover " is defined in section 2 (*r*) and insofar as it is material it provides:

" ' turnover ' means the aggregate amount for which goods are bought or sold, or supplied or distributed, by a dealer, either directly or through another,

1 (1963) 14 S.T.C. 1030.

on his own account or on account of others whether for cash or for deferred payment or other valuable consideration, provided * * * *".

The High Court of Madras in the case of *Young Men's Indian Association*[1], held that the *Explanation* to section 2 (*g*) and *Explanation* (1) to section 2 (*n*) of the Act were *ultra vires* the State Legislature, because they "created a fiction by which the concept of the word 'sale' was extended to include a transaction which properly speaking would not amount to sale." The Court held that within the meaning of the Act an incorporated members' club distributing refreshments to its members was not a 'dealer', and supply of food by it to its members for a price was not a 'sale', since the members of a club registered as a Company or as a Society merely utilise the services of the club for their needs and the members divide amongst themselves the total expenses. Essentially, in the view of the Court, the matter is not different from the case of a number of persons in a family purchasing jointly an article and later sharing the same among themselves. In such a case, it was said, there is no element of transfer of property from one to another, and the fact that the club helps its members in arranging to run a common mess will not make it the owner of the articles supplied to the members, for it is at best an agent or mandatory whose services are utilised by the members for obtaining their needs, and there is no transfer of property involved in the arrangement The Court proceeded further to observe that the distinction between members' clubs unincorporated and incorporated is that in the former the distribution made by the club to one of its members is a release by all the members in favour of a joint owner who takes the goods, in the latter the supply of articles to a member is tantamount to delivery by an agent or trustee to the principal or beneficiary, and there is in either case no transfer of ownership by a person absolutely entitled to the property to another who acquires title thereto on such transfer.

In these appeals the Deputy Commercial Tax Officer contends that the transactions of the respondent-Society are taxable and submits that the High Court was in error in holding that the *Explanations* to section 2 (*g*) and section 2 (*n*) are *ultra vires* the powers of the State Legislature. Entry 54 of List II of the Seventh Schedule of the Constitution authorises the State Legislature to legislate on the topic of tax on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List I. This Court has consistently held that the expression "sale of goods" used in the legislative entries in the Constitution and the Government of India Act, 1935, bears the same meaning which it has in the Sale of Goods Act, 1930, and therefore the State Legislature may under Entry 54, List II, legislate in respect of the series of acts beginning with an agreement of sale between parties competent to contract and resulting in transfer of property from one of the parties to the agreement to the other for a price, and matters incidental thereto, but cannot make a transaction which is not a sale within the Sale of Goods Act a sale by a statutory fiction and impose tax thereon: *State of Madras* v. *Gannon Dunkerlay & Co. Ltd.*[2]; *New Indian Sugar Mills* v. *Commissioner of Sales Tax*[3], and *Bhopal Sugar Industries v. Sales Tax Officer*[4]. Consequently if the element of transfer of property from one person to another is lacking in any transaction, there is no sale and the Legislature cannot by treating it as a sale by a deeming clause bring it within the ambit of the taxing statute.

We are however unable to hold that the transactions of the respondent Society of supplying refreshment to its members for a price paid or promised were not taxable under the Madras General Sales Tax Act, 1959 By the definition in section 2 (*g*) a 'dealer' is a person who carries on the business of buying, selling, supplying or distributing goods, whether for cash, or for deferred payment, or for other valuable consideration. The expression 'business' is defined in section 2 (*d*) as meaning any trade, commerce or manufacture, whether or not any profit

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1 (1963) 14 S.T C 1030
2 (1958) S C R 379 (1958) S C J 696 (1958) 2 An.W R (S C) 66. (1958) 2 M L J. (S.C.) 66.
3 (1963) 2 S C R (Suppl) 459 (1964) 1 S C J 644
4. (1964) 1 S C.R. 481 (1964) 1 S C J 392.

accrues from such trade, commerce, manufacture, adventure or concern. A scheme for supplying goods to its members by a Society for price may partake of the activity of the nature of adventure or concern in the nature of trade, even if the activity is not actuated by a profit-motive. The respondent-Society which has according to its object of incorporation made arrangements for the supply and distribution of refreshments to its members without a profit-motive may be regarded as carrying on trade and would on that account fall within the definition of a 'dealer' within the meaning of section 2 (g). A Co-operative Society registered under the Madras Co-operative Societies Act (VI of 1932) is by virtue of section 20 of that Act a body corporate with perpetual succession and a common seal, and with power to hold property, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purposes for which it was constituted. Such a co-operative society which carries on the business of supplying goods to its members for cash or deferred payment falls within the definition of 'dealer' in section 2 (g). We are unable to hold that by the *Explanation* to section 2 (g) it was intended to overstep the limits of legislative power. By the Explanation the State Legislature has merely clarified that a taxable entity will be regarded as a dealer within the meaning of the Act even though it buys, sells, supplies or distributes goods from or to its members, whether in the course of business or not, it is not intended by the Explanations to declare all transactions of the taxable entity with its members to be transactions of sale or purchase. The Explanation is a part of the definition of "dealer" and not of "sale". For the purpose of levying sales tax it was open to the Legislature to devise a definition of the word "dealer" and further to provide that certain bodies shall be deemed to be dealers within the meaning of the Act. We are unable, therefore, to agree with the High Court that the *Explanation* to section 2 (g) is *ultra vires* the State Legislature.

For turnover from a transaction to be taxable under the Act, the transaction must have constituent elements, *viz*, (1) parties competent to contract; (2) mutual assent, (3) thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) price in money paid or promised. When a Co-operative Society supplies to its members for a price refreshment in the canteen maintained by it, the four constituent elements of sale are normally present, the parties are competent to contract; there is mutual assent; refreshments which belonged absolutely to the Society stands transferred to the buyer and price is either paid or promised.

There is nothing on the record of the case which shows that the Society is acting merely as an agent of its members in providing facilities for making food available to the members. From the mere fact that the Society supplies refreshment to its members only and claims to make no profit, it cannot be inferred that in preparing refreshments, and making them available to its members it is acting as an agent of the members. Nor can it be said that the Society is holding its property including refreshments prepared by it for supply to its members as a trustee for its members. A registered Society is a body corporate with power to hold property and is capable of entering into contracts. It cannot be assumed that property which it holds is property of which its members are owners The property in law is the property of the Society The members are undoubtedly entitled to compel the Society to act according to its constitution and to apply the property for the purposes for which it is held, but on that account the property of the Society cannot be treated as the property of the members The society is a person : the property in the refreshments which it supplies to its members is vested in the Society and when refreshments are supplied for a price paid or promised, transfer of property in the refreshments results. In the case of an unincorporated Society, club or a firm or an association ordinarily the supply and distribution by such a Society, club, firm or an association of goods belonging to it to its members may not result in sale of the goods which are jointly held for the benefit of the members by the Society, club, firm or the association, when by virtue of the relinquishment of the common rights of the members the property stands transferred to a member in

payment of a price, and the transaction may not *prima facie* be regarded as a 'sale' within the meaning of the Act. By providing that a transfer of property in goods from a corporate body to its members for a price, the Legislature does not overstep the limits of its authority, and it cannot on that account be held that the *first Explanation* to section 2 (*n*) is in its entirety *ultra vires* the State Legislature It is, however, unnecessary in this case to say more, for, the case of the respondent-Society falls within the definition of 'sale' and no assistance need be sought from the *First Explanation* to section 2 (*n*)

Reference may briefly be made to the judgment in *Trebanog Working Men's Club and Institute Ltd* v. *Macdonald* and *Monkwearmouth Conservative Club Ltd* v. *Smith*[1], on which the High Court strongly relied. In a members' club incorporated under the Industrial and Provident Societies Acts, the shareholders and the members were identical The club purchased intoxicating liquor and supplied it from time to time to individual members for payment as in an ordinary club The Society was convicted of selling by retail, contrary to section 65 of the Licensing (Consolidation) Act, 1910, certain intoxicating liquor without a justices' licence. The Court of Appeal quashed the conviction holding that the incorporated society was a legal entity distinct from the members, and could act as their agents or trustees, the real interest in the liquor being in the members, and the Society was not obliged to take out a licence, for sale of liquor by retail. The principle of that case has, in our judgment, no application to the case before us. There was a long course of authorities in the Courts in England dealing with the liability of the clubs supplying intoxicating liquors to their members to obtain the justices' licence. In *Graff* v. *Evans* [2] Graff, the manager of an unincorporated club, the property of which was vested in trustees, and the committee of management whereof arranged to supply liquor to its members at a fixed percentage above its cost, supplied liquor to a member, and he was prosecuted for selling by retail intoxicating liquor without a licence It was held that there was no sale by retail, for the member was as much a co-owner of the liquor supplied as any other member of the club. Any member of the club was entitled to obtain liquor on payment of the price and since there was no bargain, nor any contract with the manager in respect of the liquor supplied, and the member to whom the liquor was supplied was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of association by which he subscribed a sum to the funds of the club, and on that account he became entitled to have liquor supplied to him as a member at a certain price.

In *Metford* v *Edwards*[3], a working men's club was registered under the Friendly Societies Act, 1896 It was held that liquor kept on the premises of the club by the members who are owners of the liquor and intended for consumption by the members, is distributed to the members by one of them in return for payment, is not sold by retail within the meaning of the Licensing (Consolidation) Act, 1910.

In *National Sporting Club Ltd* v *Cope*[4], it was held that a member's club formed into a joint stock company, of which shares were held by persons who were not members, was guilty of breaches of section 17 of the Beerhouse Act, 1834, and section 19 of the Refreshment Houses Act, 1860, when in carrying on the club retail intoxicating liquors and tobacco were supplied to the members of the club. The Court held in that case that the Company was a separate legal entity from the members, and the sale of intoxicating liquors to members was not a distribution of the common property of the members among themselves Channell, J , observed at page 354

"Now the law with reference to purely members' clubs may be taken to be settled, namely, that in the cases of purely members' clubs a licence is not

1. L.R. (1940) 1 K.B. 576.
2. L R (1882) 8 Q.B.D. 373.
3. L.R. (1915) 1 K.B. 171.
4. 82 L T. 353.

required, that the form that is gone through in the coffee room or in other parts of the club house where refreshments are sold is in one sense not a selling of liquors so as to make the licensing laws applicable, but that it is merely a mode of distributing common property."

The question was again raised before the Court of Appeal in *Trebanog Working Men's Club and Institute Ltd* v *Macdonald*,[1] Hewart, C J, delivering the judgment of the Court observed that the principle of the decision in *Graff* v *Evans*[2], applied even though the clubs before the Court were incorporated either under the Industrial and Provident Societies Acts or the Companies Act. The learned Chief Justice observed at page 582 .

"Once it is conceded that a members' club does not necessarily require a licence to serve its members with intoxicating liquor, because the legal property in the liquor is not in the members themselves, it is difficult to draw any legal distinction between the various "legal entities that may be entrusted with the duty of holding the property on behalf of the members, be it an individual or a body of trustees, or a company formed for the purpose, so long as the real interest in the liquor remains, as in this case it clearly does, in the members of the club. There is no magic in this connection in the expressions "trustee" or "agent". What is essential in that the holding of the property by the agent or trustee must be a holding for and on behalf of, and not holding antagonistic to, the members of the club."

The Courts in these cases were dealing with cases of quasi-criminal nature, and the substance of the transaction rather than the legal form in which it may be clothed had to be determined It was held that if in substance the property in the liquor held by the club—whether incorporated or unincorporated—was vested in the members, when a member received and paid for it, there was no sale within the meaning of the Licensing Act, but was a transfer of a special property in the goods from all the other members of the club to the consumer in consideration of the price paid

We are not dealing in this case with liability criminal or quasi-criminal. The question is one of liability under a taxing statute and the Court in determining the liability of the Society to pay tax cannot ignore the form and look at what is called the "substance of the transaction" *Ex facie*, the transaction is one in which the legal owner of property transfers it to another pursuant to a contract for a price, and that transaction must be regarded as a sale Whether by appropriate provisions in the Articles of Association or Rules, a scheme may be devised under which the goods supplied may be treated as belonging to the members of the Society, and the Society merely acts as an agent in supplying the food to its members, need not be considered in the present case It will suffice to state that it cannot be urged as a proposition of law that when a Co-operative Society supplies to its members refreshments for a price under a scheme for distribution or supply of refreshments, the transaction can in no event be regarded as a sale of the refreshments supplied for a price

We are not called upon in this case to decide whether an unincorporated club supplying goods for a price to its members may be regarded as selling goods to its members.

We are of the view that the *Explanation* to section 2 (*g*) of the Madras General Sales Tax Act I of 1959 is not *ultra vires* the Legislature Whether any part of the *Explanation* (1) to section 2 (*n*) is *ultra vires* the Legislature does not fall to be determined in this case, for, we are of the view that the transactions of the respondent Society fell within the substantive part of the definition of the expression "sale", and on that account those transactions are taxable under the Madras General Sales Tax Act I of 1959.

The appeals must therefore be allowed, and the petitions filed by the Society dismissed In view of the order passed by this Court on 12th August, 1965, when leave was granted to appeal to this Court, the appellant will pay costs of these appeals to the respondent There will be one hearing fee in the three appeals.

S.V.J. —— *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT —J. C. SHAH, S.M. SIKRI AND J M. SHELAT, JJ.

Kalidindi Venkata Subbaraju and others .. *Appellants**

v.

Chintalapati Subbaraju and others .. *Respondents.*

Evidence Act (I of 1872), sections 65, 90 and 101 to 103—Original will suppressed by one party—Certified copy of will produced by opposite party—Admissibility under section 65—Presumption of due execution under section 90—If and when can be drawn—Effect of admitting copy of will as secondary evidence—Onus of proof that testator was major and was competent to execute the will—On whom lies.

Evidence Act (I of 1872), sections 32 (5) and (6)—Scope—Statement regarding age of a person—Admissibility under section 32 (5)—Statement to be admissible under sub-section (5) or (6) must have been made ante litem motam.

Where the original will is in the custody of one of the parties and is suppressed by him, a certified copy produced from proper custody by the opposite party would be admissible as secondary evidence under section 65 of the Evidence Act.

If the document produced is a copy admitted under section 65 of the Evidence Act and it is produced from proper custody and is over 30 years old, only the signature authenticating the copy can be presumed to be genuine In such a case the Court cannot relying on section 90 of the Evidence Act draw the presumption of due execution of the original document. The production of a copy does not warrant the presumption of due execution of the original document. Such a presumption under section 90 arises in respect of the original documents only.

Thus, where only a copy of a will is produced and not the original the Court cannot relying on section 90 of the Evidence Act draw the presumption that the will being more than 30 years old, it was duly executed and attested by the persons by whom it was purported to have been executed and attested.

But the effect of a certified copy of a will having been rightly admitted as secondary evidence would be as if the contents of the will were before the Court and the Court could proceed to construe those contents.

The onus of proof that the testator was a major at the time he executed his will and was competent to execute it, is on the person who wants to rely on the will.

It is clear from sub-section (5) of section 32 of the Evidence Act that if construed literally it is possible to contend that a statement regarding the age of a person is not one relating to the existence of any relationship by blood, marriage or adoption But such a literal construction is not a proper one. A statement as regards age is tantamount to a statement as to the existence of relationship.

This being the position under section 32 (5) of the Evidence Act, a statement made by a testator in his will that he was 19 years of age at the time of its execution is admissible in a litigation arising after the death of the testator and could be, relied upon as establishing that the testator was a major and was competent to make the said will.

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*C A No. 129 of 1965 21st November, 1967

Both sub-sections (5) and (6) of section 32 of the Evidence Act declare that in order to be admissible the statement relied on must be made *ante litem motam* by persons who are dead *i e.*, before the commencement of any controversy, actual or legal, upon the same point. The words "before the question in issue was raised" do not merely mean before it was raised in the particular litigation in which such a statement is sought to be adduced in evidence, but before even the existence of any actual controversy concerning the subject of the declarations.

Appeal by Special Leave from the Judgment and Decree, dated the 24th August, 1962 of the Andhra Pradesh High Court in Appeal No 419 of 1958.

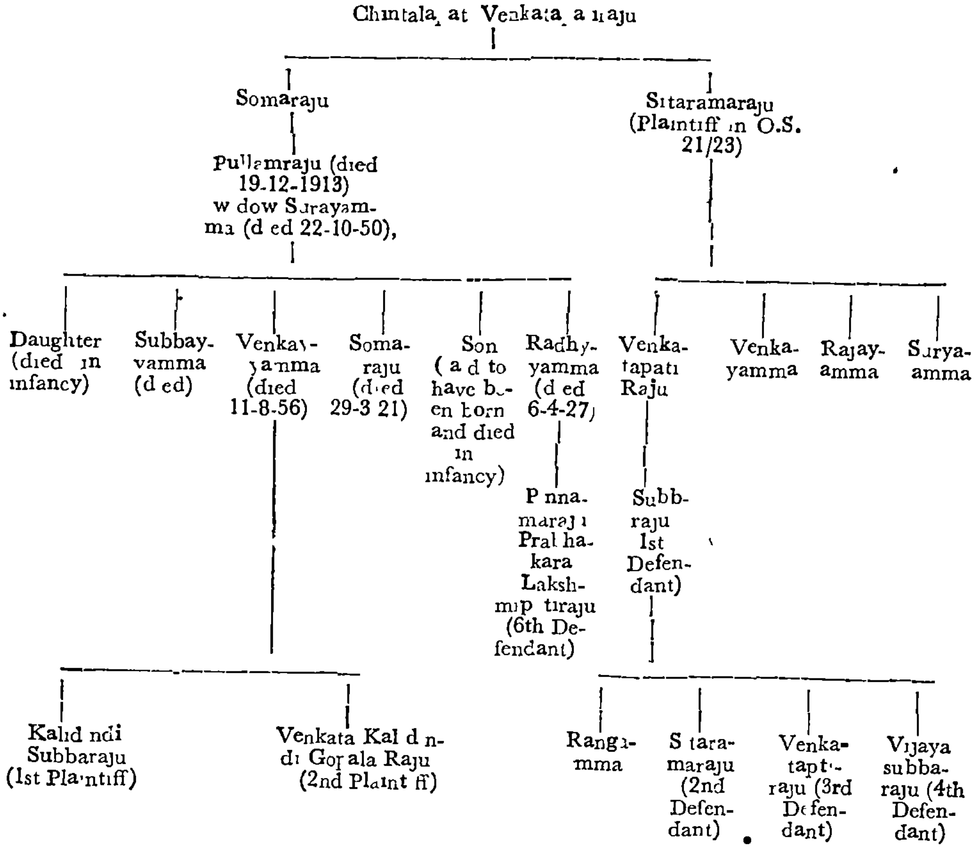
S T Desai, Senior Advocate (*M. S K Sastri* and *M. S. Narasimhan*, Advocates, with him), for Appellants.

H R. Gokhale, Senior Advocate (*R Ganapathy Iyer*, Advocates, with him) for Respondents Nos 1 to 4

The Judgment of the Court was delivered by

Shelat, J—This Appeal by Special Leave is directed against the judgment and decree of the High Court of Andhra Pradesh confirming the dismissal by the trial Court of the suit filed by appellants 1 and 2.

The pedigree set out below clarifies the relationship between the parties :—



Pullamraju died leaving him surviving his undivided son Somaraju, his widow Surayamma and three daughters Somaraju died on 29th March, 1921 whereupon the said Surayamma claimed that he had left a will dated 26th March, 1921 where under all the properties had been bequeathed to her absolutely. Sitaramaraju the uncle of Pullamraju filed Suit No. 21 of 1923 for a declaration that Somaraju's

will was not valid as he had executed it when he was a minor and was not in a sound disposing state of mind. Surayamma in her written statement filed in that suit contended that Somaraju was a major having been born on 7th January, 1903 and was in a sound disposing state of mind when he executed the said will. The suit ended in a compromise decree by which Sitaramaraju admitted that Somaraju was a major when he died that he was in a sound disposing state of mind and that the will therefore was genuine and valid. Under the compromise decree he received 26 out of about 57 acres of land and the rest of the property was retained by Surayamma. Thereafter, Surayamma conducted herself as the absolute owner of the properties which came to her under the said decree. By two deeds both dated 30th March, 1925, she settled part of the land received by her under the said decree in favour of her two daughters the mothers of plaintiffs 1 and 2 and defendant 6 respectively. The said properties have since been possessed of and enjoyed first by the said two daughters and later by plaintiffs 1 and 2 and defendant 6. On 3rd November, 1947 Surayamma gifted another portion of the said property to defendant No. 6. Surayamma died on 22nd October, 1950. Plaintiffs 1 and 2 and defendant 6 (the present appellants) thereafter obtained a deed of surrender from their mothers and filed the suit out of which this appeal arises, contending that they were the nearest reversioners of Somaraju, being the sons of his sisters, that the said compromise decree was collusive, that the said Somaraju did not execute the said will, that even if he did he was not a major nor of sound disposing state of mind when he executed it and that therefore the said will was not valid. By a subsequent amendment of the plaint they also contended that some of the land left by Somaraju were not disposed of under the said will, that there was consequently intestacy in respect thereof which in any event they as reversioners were entitled to claim. The respondents resisted the suit contending that the said will was valid, that the said compromise decree was binding on the appellants and that they having accepted and enjoyed the said properties settled upon their mothers by Surayamma, they were estopped from challenging the will or the said decree. They also denied that any of the properties left by Somaraju remained undisposed of by the said will or that there resulted any intestacy regarding them or that on such intestacy the appellants became entitled thereto. The trial Court held that Somaraju did execute the will, that the original will was with the appellants and was suppressed by them, that therefore its certified copy produced from the records of the Court was admissible that the said will was valid as Somaraju was a major and in a sound disposing state of mind when he executed it, that the said decree was by way of a family arrangement in settlement of *bona fide* disputes, that it was binding upon the appellants and that the appellants were estopped from disputing the will or the said decree. The trial Court also repelled the contention that Somaraju left any property undisposed of under the said will or that the appellants became entitled thereto upon an intestacy. In appeal against the said judgment the High Court confirmed the dismissal of the suit by the trial Court. The High Court also confirmed the trial Court's conclusion that the certified copy of the said will was admissible as secondary evidence thereof and that Somaraju was a major and in a sound disposing state of mind when he executed the said will. The High Court also confirmed the trial Court's conclusion that the said decree was binding on the appellants and that the appellants and their respective mothers having accepted and enjoyed the properties settled upon them by Surayamma were estopped from disputing either the will or the said decree.

Mr. S. T. Desai for the appellants raised the following contentions:—

"(1) that the burden of proof that the will was validly executed by Somaraju and that he was a major at the time of executing it was upon the respondents and that they failed to discharge that burden, (2) that the conclusion of the High Court and the trial Court that he was 19 years of age at the time he executed the will was not justified, (3) that the High Court erred in holding that extracts from the Birth and Death Registers produced by the appellants were not public documents within the meaning of section 35 of the Evidence Act and therefore not admissible, (4) that the High Court erred in holding that even if the will was not

proved to have been validly executed, the said compromise decree was binding on the appellants and estopped them from challenging the validity of the will or the said decree, (5) that the appellants did not claim through the said Venkamma but under the Hindu Law of Inheritance (Amendment) Act (II of 1929) and therefore there was no question of the compromise decree being binding on them or their being estopped from disputing the will or the said decree, and (6) that in any event, Somaraju did not dispose of land admeasuring about A 15 14, that there was therefore intestacy in regard to it and the appellants as reversioners ought to have been held entitled to it."

As aforesaid, the respondents did not produce the original will but produced only its certified copy, Exhibit B-9, which they obtained from the record of Suit No 21 of 1923 wherein Surayamma had filed the original will along with her written statement. The respondents, however, had given notice to the appellants to produce the original will alleging that it was in their possession but the appellants denied the allegation and failed to produce the will Both the trial Court and the High Court were of the view that the said will along with other papers of Somaraju were in the appellants' custody, that they had deliberately withheld it as it was in their interest not to produce it The trial Court therefore was in these circumstances justified in admitting the certified copy of the will as secondary evidence of the contents of the will Since the will was executed in 1921 and the testator had died soon after its execution it was not possible to produce either its writer or the witnesses who attested it It was undisputed hat its scribe and the attesting witnesses were all dead except Dallapati Venkatapathi Raju D W 4 But the appellants' contention as regards D W 4 was that he was not the same person who attested the will The High Court appears to have relied upon section 90 of the Evidence Act and to have drawn the presumption that the will being more than 30 years old it was duly executed and attested by the persons by whom it purported to have been executed and attested Such a presumption, however, under that section arises in respect of an original document (See *Munnalal* v *Krishibai*[1] Where a certified copy of a document is produced the correct position is as stated in *Basant Singh* v. *Brij Rai*[2], where the Privy Council laid down that if the document produced is a copy admitted under section 65 as secondary evidence and it is produced from proper custody and is over 30 years old only the signatures authenticating the copy can be presumed to be genuine. The production of a copy therefore does not warrant the presumption of due execution of the original document The Privy Council repelled the argument that where a copy of a will has been admitted the Court is entitled to presume the genuineness of such will which purports to be 30 years old. Relying on the words " where any document purporting or proved to be 30 years old " in section 90, the Privy Council held that the production which entitles the Court to draw the presumption as to execution and attestation is of the original and not its copy and that the decisions of the High Courts of Calcutta and Allahabad on which the argument was based were not correctly decided This view has since then been approved of by this Court in *Harihar Prasad* v. *Deonarain Prasad*[3]. The High Court therefore was not entitled to presume from the production of the copy either the execution or the attestation of the said will.

But, apart from such presumption there was evidence from which the High Court could conclude that the will was duly executed by Somaraju and attested by the witnesses who appear to have affixed their signatures thereto There was, firstly, the fact of Surayamma having produced the will soon after its execution in Suit No 21 of 1923 Secondly, there was evidence of her having based her claim to Somaraju's property in the said suit by virtue of and under the said will. Thirdly, there was the evidence of conduct of Surayamma in dealing with the property as an absolute owner basing her claim under the said will Fourthly, there were the three settlement deeds executed by her in favour of her daughters and lastly

1 A I R 1947 P C 15 L R 73 I A 223 (1946) 2 M L J 453

2 (1935) L R 62 I A 180 69 M L J 225

3 (1956) S C J 279 : (1956) S C R. 1 at 9: A I R 1956 S C 305

the fact of the terms of the said will being natural and rational, consistent with Somaraju's anxiety that in the absence of any male heir to him the properties should go to his mother to enable her to make due provision for his three sisters instead of dying intestate and the properties thereon going to the said Sitaramaraju and his heirs under the law as it then stood There was next the evidence of D W 4 testifying to the execution of the will by Somaraju and to his having attested the original will along with other witnesses His evidence also was that Somaraju was then in a sound disposing state of mind Both the trial Court and the High Court accepted the evidence of D W 4 as of the person who along with others had attested the will There was thus ample evidence from which the High Court could conclude and in our view rightly that Somaraju executed the said will and was at the time in a sound disposing state of mind. The effect of the certified copy of the will having been thus rightly admitted was as if the contents of the will were before the Court and the Court should proceed to construe those contents We are supported in this conclusion by authority In *Setthaya* v. *Somayajulu*[1], the original grant which was 250 years old was lost but a copy of it was produced from the respondents' custody It bore the following endorsement of the predecessors of the respondents: 'Originals have been retained by us and copies have been filed, 1858 ' The Privy Council held that the copy was properly admitted under section 65 and 96 of the Evidence Act as secondary evidence of the terms of the grant and that the statement and the said endorsement authenticating the copy were evidence as a statement by a deceased person in a document relating to a relevant fact and also as an admission of the respondents' predecessors. The Privy Council also held that the copy being admissible as secondary evidence of the terms of the original grant the Court could proceed upon the footing that the terms of the said grant were before it and could therefore consider them The High Court was therefore quite competent in construing the contents of the said will and in holding that the terms of the said will were natural and rational and proved that Somaraju was in a sound disposing state of mind.

The question, however, still remains whether Somaraju was a major at that time The onus of proof that he was then a major and could competently execute it was on the respondents who relied on the will (See *Ganaprakasam* v *Parasakthy*[2] The appellants' case was that Somaraju was born in 1905 and not in 1903 as alleged by the respondents The admitted position was that all the children of Pullamraju were born in the village Isukapalli The parties in support of their rival contentions produced both oral and documentary evidence Apart from the certified copy of the will and Surayamma's written statement in Suit No 21 of 1923, 4 other documents Exhibits A-4, A-5, A-9 and B-24 were filed in the trial Court. B-24 produced by the respondents was an extract from the Birth Register of Isukapalli. Exhibit A-4 and A-5 produced by the appellants were respectively an extract from the Birth Register of Isukapalli and an extract from the Death Register relating to Somaraju's death Exhibit A-9 also produced by the appellants was a reply to them from the department concerned that there was no entry in regard to Somaraju's birth in the Birth Register of 1903 of Isukapalli. Curiously the registers of births and deaths of Isukapalli village for 1903 and 1905 were available in 1955 but in 1957 when the trial Court called for these registers it was informed that those registers could not be traced The result was that the only evidence before the Court consisted of certified copies of extracts, Exhibits A-4 and A-5, from those registers and the said letter Exhibit A-9 Exhibit B-24, it appears, was motheaten, overwritten and tampered with at some places with ink different from the original ink in which the rest of the document was written Both the trial Court and the High Court were agreed that it could not therefore be considered as furnishing evidence of Somaraju's date of birth Exhibit A-4 was an extract of Birth Register for the year 1905. The appellants' contention was that this extract furnished evidence that Somaraju was born in 1905. It was said to have been obtained by Surayamma

1. I L R 52 Mad. 453 56 M L J 730 (1929) L R. 56. I.A. 146. A.I.R. 1929 P C. 115.

2 A I R 1941 Mad. 179

in 1941 as she intended to file some suit which she ultimately did not. Assuming that A-4 was admissible under section 35 of the Evidence Act, it could not assist the appellants as it only indicated at best that a son was born of Pullamraju in 1905. The case of the respondents, however, was that another son besides Somaraju was born of Pullamraju after Somaraju's birth. In the absence of any evidence led by the appellants that A-4 related to Somaraju and no one else, the extract obviously could not establish that Somaraju was born in 1905 and therefore was a minor in 1921. Exhibit A-5 showed that Somaraju died on 29th March, 1921 but there was dispute as to the date of his death. There was no doubt reference in that extract that he died at the age of 16. But the High Court found that the figure '16' for his age was written in an ink different from that used for the other entries in the extract and that that figure was an interpolation made by some one subsequently. Both the trial Court and the High Court were in fact of the opinion that Exhibits A-4 and A-5 were not genuine. The High Court was further of the view that Exhibit A-5 had been tampered with and therefore could not be relied upon. Exhibits B-24, A-4 and A-5 thus having been found to have been tampered with and therefore unreliable documents, it is not necessary for us to go, as the High Court did, into the question whether such extracts were admissible under section 35 of the Evidence Act or not.

Besides these extracts, the appellants also produced Exhibits A-8 and A-9 a memo. issued by the Taluk Office, Kakinada and an endorsement dated 17th September, 1955 issued by the Head Clerk of the Taluk Office, Pithapuram respectively. The memo. stated that there were no entries in the Birth Register of 1903 for Tanuwalla village relating to the birth of any of the children of Pullamraju. The endorsement stated that an application for extract from the Birth Register for 1903 in respect of the birth of any of the children of Pullamraju was filed but as there were no such entries in the Birth Register for Isukapalli for 1903 the stamps sent by the applicants for the copy were returned. Neither the writer of Exhibit A-8 nor of A-9 was examined to testify to the contents of the said memo and the said endorsement and to establish that notwithstanding their diligent efforts the original registers were not traceable. Exhibits A-8 and A-9 could not be admitted in evidence without the formal proof of the entries and were rightly held inadmissible. We need not consider the rest of the documentary evidence *viz*, Exhibits A-3 and A-7 produced by the appellants neither of them was relied upon before us.

Both the parties, as aforesaid, led considerable oral evidence. However, except for the evidence of D W 4 both the trial Court as well the High Court found that the oral evidence of these witnesses was speculative in character and therefore could not be said to have established either of the rival contentions as to Somaraju's age. No reason has been shown that their assessment of this evidence was wrong. This being the position regarding the evidence led by the parties there remains only three pieces of evidence requiring consideration, *viz*, (1) the statement of Somaraju as to his age in the said will; (2) the statement of Surayamma in the said written statement and (3) the subsequent conduct of Surayamma, the mothers of the appellants and the appellants themselves.

The question canvassed both before the High Court and us was whether the statements made by Somaraju and Suryamma in the said will and in the said written statement respectively were admissible and could be used to establish that Somaraju was 19 year of age at the time when he executed the said will. Section 32 (5) of the Evidence Act provides that—

"When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge."

Section 32 (6) provides that

"When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed

ever, of the expressly declared intention in the of the entire property including the land measur- to hold that he desired to hold back a portion led to leave it intestate. We do not therefore with the conclusion of the trial Court and the l of the entire property. Consequently we must

h costs.

Appeal dismissed.

EME COURT OF INDIA.

Appellate Jurisdiction.)

V. RAMASWAMI AND V. BHARGAVA, JJ.

tiar (dead) by his legal represen- .. *Appellants**

'ayar etc. .. *Respondents.*

)8), *section* 3 (2) (d) (*as amended by Madras Act II of uestion whether grant in inam is a whole village or less decided with reference to facts of each case—Estate— estate*

·08), *sections* 3 (10) (b) *and* (61), 6 *and* 185—" *Private - Test to determine.*

'adugai, Pannai, Kambattam, Sir, Khas and Thottam— t.

tes a whole village and therefore an estate within (*d*) of the Act The question whether with regard was granted in inam is a whole village or less than a hat has to be decided with reference to the facts of

" iruwaram " in the documents is not decisive of the private land or not.

the Act, private land comprises of two categories, called, and lands deemed to be private lands. In nically so called, it must be the domain or home-farm derstood in law. The mere fact that particular lands rlance as pannai, kambattam, sir, khas, is not decisive ands so called partake of the characteristics of domain correct test to ascertain whether a land is domain or nd which a zamindar has cultivated himself and intends cultivation by himself even if from time to time he Legislature did not use the words "domain or home- ing to them a meaning; and it is reasonable to suppose d attach to these words the meaning which would be y English The sub-clause (*b*) (i) of the definition is ds which come obviously within what would ordinarily ain or home farm, that is to say, lands appurtenant to and kept for his enjoyment and use. The home-farm d cultivates himself, as distinct from land which he lets d. The first clause is, therefore, meant to include and are in the ordinary sense of the word home-farm lands.

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nd 69 to 71 of 1963. 10th January, 1968

The other clauses of the definition appear to not necessarily be regarded as home-farm lan and with reference to those lands there is a sale for arrears of revenue shall not be regarde tly by the landlord for the required period indicates clearly that the ordinary test for 'pr by the landholder for his personal use and c personal supervision Such lands may be let o of the landholder without losing their distinc intention or the scheme of the Act to treat as p to which the only peculiarity is the fact that th in the lands and has been letting them out on s something in the evidence either by way of proo clear indication of an intent to regard these la use of the landholder and his establishment in c special category of private lands in which a tena occupancy rights (On facts *held*, that there is no directly cultivated by the landholder and the app evidence to rebut the presumption under sectı description of the land as " Padugai " is not of are also called as Orathur Thottam, thottam m crops are raised to distinguish it from paddy fiel ween two rivers and comprise more than 100 acre cannot be ' Padugai ' in the sense in which the ter

Appeals from the Judgment and Decree dated Madras High Court in Appeal Suit Nos. 223 and 2 and 277 to 279 of 1952 †

R. Kesava Iyengar, Senior Advocate (*R Thia* Advocates, with him), for Appellants (In all the Ap

Bishan Narain, Senior Advocate (*O P. Malhotra*, *chanji & Co.*, with him), for Respondent No 1 (In C

M R. K Pillai, Advocate for Respondent No and for Respondents (In C. As Nos 56 to 65, 67 an

The Judgment of the Court was delivered by

Ramaswami, J—These appeals are brought again A. S Nos 223 and 224 of 1951, 264 to 273 of 1952, 1952 of the Madras High Court, dated 10th January, 19 decree in O S Nos. 75, 77 to 81 of 1949 and 19 to 22, 1950 of the Subordinate Judge, Tanjore.

The appellant instituted the above-mentioned su from the respective defendants of the disputed lands at the rate of Rs 50 per annum per acre The case c disputed lands which were purchased by him by a sale 1948 (Exhibit A-145) are situated in Orathur Padugai mangala, one of the villages comprised in what is Palace Estate," that the said lands are not situated in Madras Estates Land Act I of 1908 (hereinafter referr any event the said lands are 'private lands' of the appe as defined in the Act and the various defendants are tre tion of the lands and had no right to continue in po liable to ejectment. The appellant also claimed that tl pay damages at the rate of Rs 50 per annum per acre in r unlawful occupation. The defence in all the suits w It was contended by the defendants that the disputed la

† (1957) 1 M.L.J. 72.

within the meaning of section 3 (2) (*d*) of the Act, that the lands are 'ryoti lands' in which they have permanent right of occupancy and that they are not "private lands" as alleged by the appellant and the civil Court had therefore no jurisdiction to entertain the suits and the Revenue Courts alone had jurisdiction. By his two judgments dated 31st October, 1950, and 2nd February, 1951, the Subordinate Judge, Tanjore dismissed the suits, holding that the lands were situated in an estate and were 'ryoti lands' in which the defendants were entitled to occupancy rights. The appellant took the matter in appeal to the Madras High Court which affirmed the decision of the trial Court and dismissed all the appeals.

The two principal questions which are presented for determination in these appeals are (1) whether the suit-lands are located in an estate within the meaning of section 3 (2) (*d*) of the Act, and (2) if the answer to the first question is in the affirmative, whether the suit-lands are 'private lands' or 'ryoti lands' as defined in the Act.

Section 3 (2) (*d*) of the Act, as originally enacted states:

"3. In this Act, unless there is something repugnant in the subject or context:—

. ...

(2) 'Estate' means—

....

(*d*) any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof, provided that the grant has been made, confirmed or recognised by the British Government, or any separated part of such village"

The section was amended by the Madras Estates Land (Third Amendment) Act XVIII of 1936 to the following effect:

"(*d*) any inam village of which the grant has been made, confirmed or recognised by the British Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees, or the successors-in-title of the grantee or grantees.

Explanation (1):

Where an inam village is resumed by the Government it shall cease to be an estate; but, if any village so resumed is subsequently regranted by the Government as an inam, it shall, from the date of such regrant be regarded as an estate:

Explanation (2):

Where a portion of an inam village is resumed by the Government, such portion shall cease to be part of the estate, but the rest of the village shall be deemed to be an inam village for the purposes of this sub-clause If the portion so resumed or any part thereof is subsequently regranted by the Government as an inam, such portion or part shall, from the date of such re-grant be regarded as forming part of the inam village for the purposes of this sub-clause"

By section 2 of the Madras Act (II of 1945) section 3 of the Act was further amended as follows

"*Section* 2—(1) In sub-clause (*d*) of clause (2) of section 3 of the Madras Estates Land Act, 1908 (hereinafter referred to as the said Act) *Explanations* (1) and (2) shall be renumbered as *Explanations* (2) and (3) respectively and the following shall be inserted as *Explanation* (1), namely .

"*Explanation* (1):

Where a grant as an inam is expressed to be of a named village, the area which forms the subject-matter of the grant shall be deemed to be an estate notwithstanding that it did not include certain lands in the village of that name which have already been granted on service or other tenure or been reserved for communal purposes;"

(2) The amendment made by sub-section (1) be deemed to have had effect as from the date on which the Madras Estates Land (Third Amendment) Act, 1936 came into force and the said Amendment shall be read and construed accordingly for all purposes."

Section 3 (19) of the Act has defined a " Village " as follows :

" 'Village ' means any local area situated in or constituting an estate which is designated as a village in the revenue accounts and for which the revenue accounts are separately maintained by one or more karnams or which is now recognized by the State Government or may hereafter be declared by the State Government for the purposes of this Act to be a village, and includes any hamlet or hamlets which may be attached thereto."

The history of what is known as the " Tanjore Palace Estate " is well-known and will be found in various reported decisions of the Judicial Committee and of the Madras High Court (See *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*[1], *Sundaram Ayyar* v *Ramachandra Ayyar*[2], *Maharaja of Kolhapur* v *Sundaram Iyer*[3] and *Chota Raja Saheb Mohitai* v *Sundaram Iyer*[4] In 1799, Serfoji, the then Raja of Tanjore surrendered his territory into the hands of the East India Company, but he was allowed to retain possession of certain villages and lands which constituted his private property. When his son the last Raja died in 1855 without leaving male issue, the East India Company took possession of all his properties including his private property. Thereupon the senior widow. Kamachee Boye Sahaba, filed a Bill on the Enquiry Side of the Supreme Court of Madras, and obtained a decree that the seizure of the private properties was wrong On appeal by the Secretary of State in Council of India, the Privy Council reversed the decree, and ordered the dismissal of the Bill Thereafter, a memorial was submitted to the Queen and in 1862 the Government of India which had succeeded the East India Company " sanctioned the relinquishment of the whole of the landed property of the Tanjore Raj in favour of the heirs of the late Raja " Under instructions from the Government of India, the Government of Madras, on 21st August, 1862, passed an order the material part of which is as follows

" In Col Durand's letter above recorded the Government of India have furnished their instructions with reference to the disposal of the landed property of the Tanjore Raj regarding which this Government addressed them under date the 17th May last Their decision is to the effect, that ' since it is doubtful whether the lands in question can be legally dealt with as State property, and since the plea in equity and policy, for treating them as the private property of the Raja is so strong that it commands the unanimous support of the members of the Madras Government,' the whole of the lands are to be relinquished in favour of the heirs of the late Raja (page 228) "

The Tanjore Palace Estate came into being as a result of this grant.

The question in these appeals is whether the property involved in the suits being a part of the Tanjore Palace Estate can be considered to be an " estate " within the meaning of the term in the Act It was conceded by the Counsel for the appellant that if it was part of an inam it would be an ' estate' within the meaning of that Act. It was, however, contended that the manner in which the property reverted to the widows of the Raja in 1862 after an act of State did not show that the estate was freshly granted out was restored to the widows who enjoyed both the warams, in the same way as the warams were enjoyed before To put it differently, the argument was that the effect of restoration or relinquishment was only the undoing of the wrong and therefore if the villages were the private properties of the Raja at the time of the seizure then the same character is maintained when they were handed back to his widow The contention was that what actually happened in 1862 was the restoration of the *status quo ante* rather than a fresh grant by the

1. (1866-68) 3 M H C R. 424
2. (1918) 32 M L J 333 I L R 40 Mad 89
3. (1925) I L R. 48 Mad 1.
4. L R 63 I A. 224 (1936) 71 M L J. 41 I L R 59 Mad. 633.

British Government The argument is not a new one but has been raised before and rejected in a number of authorities. In *Jiyoyiamba Bayi Saiba* v *Kamakshi Bayi Saiba*[1], it was held by the Madras High Court that the Government Order, 1862 was a grant of grace and favour to persons who had forfeited all claims to the personal properties of the Rajah by the act of State and was not a revival of any antecedent rights which they might have had A similar opinion of the grant was expressed in a Full Bench case of the Madras High Court, in *Sundaram Ayyar* v. *Ramachandra Ayyar*[2]. But in *Maharaja of Kolhapur* v. *Sundaram Iyer*[3], Spencer, O C J, appeared to doubt the decision of Scotland, C J, in *Jiyoyiamba Bayi Saiba* v *Kamakshi Bayi Saiba*[1], that there was a grant of grace and favour in 1862 A similar view was taken in *Sundaram* v *Daya Sankara*[4], but these cases have been subsequently explained or not accepted on this point. In *T. R Bhayani Shankar Joshi* v. *Somasundara Moopanar*[5], it was held by this Court that the act of State having made no distinction between the private and public properties of the Rajah the private properties were lost by the Act of State leaving no right outstanding in the existing claimants. The Government Order, 1862 was therefore a fresh grant due to the bounty of the Government and not because of any antecedent rights in the grantees It was pointed out that the words " relinquished " or " restored " in the Government Order did not have the legal effect of reviving any such right because no rights survived the act of State. The root of title of the grantees was the Government Order of 1862 and it was therefore held that the restoration amounted to a grant in inam by the British Government within the meaning of the Act But the question whether with regard to any particular area what was granted in inam is a whole village or less than a whole village is a question that has to be decided with reference to the facts of each particular case

The question therefore arises whether the area in question, *viz*, Orathur Padugai, constitutes a whole village and therefore an estate within the meaning of section 3 (2) (*d*) of the Act It was contended for the appellant that the suit-lands were not comprised in a whole inam village The contention was rejected by both the lower Courts which concurrently held that the lands were located in Orathur Padugai, a whole village by itself or a named village and therefore an estate within the meaning of the Act It was argued on behalf of the appellant that the finding of the lower Courts is vitiated in law because it is based on no evidence. In our opinion, there is no justification for this argument On behalf of the respondents reference was made to Exhibit A-64 Pannimangalam Vattam Jamabandhi Account individual-war, Fasli 1296 which shows in column No. 3 Orathur Padugai as a village Similarly, in Exhibit A-78 (*a*), Cess account for Pannimangalam Vattam and Exhibit A-79, the Village war Jamabhandhi Account Fasli 1309 Orathur Padugai village is shown as a whole village. Exhibit A-82, Village—war Jamabhandi Individual—War, Fasli 1310, Ex-A-84, Jamabandhi Ghoshpara for the village, Fasli 1311 and Exhibits A-153 to A-157 all mention Orathur Padugai as a village. All the leases, lease auctions and receipts given for payment of rent speak of Orathur Padugai as a separate village Even the sale deeds, Exhibits B-6, B-31, B-32 and B-33 contain a recital of Orathur Padugai as a separate village It is manifest therefore that there is sufficient material to show that at least since 1830 onwards Orathur Padugai is a whole village On behalf of the appellant reference was made to Exhibit A-128 and Exhibit A-129, dated 6th April, 1800 and 5th July, 1800. Exhibit A-128 is a letter from the Resident, Tanjore to the Secretary to the Government of Madras in which there is a reference to Pannimangalam It is stated therein that "the fields of Pannimangalam to the westward of Tanjore which from time immemorial have been reserved for the pasture of the circar cows do remain in the Raja's possession. There is neither village nor cultivation on these lands " In answer to this letter there is a communication from the Chief Secretary to the Government to the Resident, Tanjore, Exhibit A-129 In para 5 of this letter it is stated; " The

1. (1866-68) 3 M H C.R 424
2. (1918) 32 M.L.J. 333 I L.R. 40 Mad. 389.
3. (1925) I L R 48 Mad. 1.
4. A I R 1918 Mad. 428.
5. (1963) 2 S.C.R. 421.

fields of Pucanymangalam containing neither village nor cultivation shall remain in the hands of Rajah for the pasturage of His Excellency's cows " Much reliance was placed by Counsel for the appellant on these two documents, but the High Court has rightly pointed out that the identity of the lands referred to in Exhibits A-128 and A-129 is doubtful The lands in suit are situated at least 30 miles south-east of Tanjore town in Mannargudi taluk but in Exhibits A-128 and A-129 the lands are described as westward of Tanjore. That there was Orathur village in existence even as early as 1830 is clear from Exhibit A-151 because in describing certian boundaries of another village it is mentioned as to the north of assessed Orathur village *nadappu karai* (bound pathway). Exhibit A-4 of 1868 is a Debit and Credit Balance account relating to Orathur Padugai attached to Mukasa Pannimangalam Thattimal It is clear from this Exhibit that the entire village except the waste land was assessed. From Exhibit A-5, dated 4th September, 1870, it appears that the punja lands in Orathur village were taken on lease from the Collector of Tanjore who was the receiver and manager of the estate of the Rajah of Tanjore for a period of 5 years on payment of a total sum of Rs 122-9-3 Exhibits A-7, A-8, A-12 to A-16 and A-18 are either *Adaiyolai muchilikas* or lease deeds for leasing the lands in Orathur padugai village for a term granted by the Collector of Tanjore In all these documents the description is that the lands are situated in Orathur Padugai in Mokhasa Pannymangalam Thattimal The documents range between the years 1870 to 1875 In Exhibit A-63 which is the Individual-war settlement register for Pannymangalam vattam for fasli 1296 against column 6 it is stated that the income in the matter of the *amani* cultivation of sugarcane, etc, on 95 kullis is Rs. 4 and it is in Orathur padugai village, Pannymangalam vattam, Exhibit A-61 is the debit and credit balance account of Orathur padugai for fasli 1294. Similarly, in Exhibit A-64, the individual-war settlement register for Pannimangalam vattam, column 3 relating to the village of Orathur states that the Orathur padugai is a village and the vattam is Pannimangalam. There are similar descriptions of Orathur as a village in Exhibit A-65 which is the settlement register for Pannimangalam vattam for Fasli 1297. Exhibit A-80 contains a similar description of Orathur village in Pannimangalam vattam. Exhibits A-153 to A-155 and A-157 are all lease deeds between the years from 1901 to 1906 relating to lease of lands in Orathur padugai. It is manifest that there is sufficient evidence to show that from 1868 right up to 1907 Orathur padugai was considered as a separate village. It was contended for the respondents that even after the passing of the Act Orathur padugai was treated as a separate village. Reference was made in this connection to a number of documents, Exhibits A-158, A-105, A-159, A-106, A-116, A-161, B-17, A-117 to A-120, B-18, A-121, A-162 and A-163. In our opinion, the finding of the lower Courts that Orathur padugai is a whole village and therefore constitutes an 'estate' within the meaning of the Act is supported by proper evidence and Counsel for the appellant is unable to make good his argument that the finding of the lower Courts is in any way defective in law.

We proceed to consider the next question arising in this case, *viz*, whether the suit-lands are 'private lands' within the meaning of section 3 (10) (*b*) of the Act which reads as follows.

"3. In this Act, unless there is something repugnant in the subject or context—

....

(10) 'Private'—

....

(*b*) in the case of an estate within the meaning of sub-clause (*d*) of clause (2), means—

(*i*) the domain or home-farm land of the landholder, by whatever designation known, such as, kambattam, khas, sir or pannai; or

(*ii*) land which is proved to have been cultivated as private land by the landholder himself, by his own servants or by hired labour, with his own or hired

stock, for a continuous period of twelve years, immediately before the first day of July, 1908, provided that the landholder has retained the kudivaram ever since and has not converted the land into ryoti land; or

(*iii*) land which is proved to have been cultivated by the landholder himself, by his own servants or by hired labour, with his own or hired stock, for a continuous period of twelve years immediately before the first day of November, 1933, provided that the landholder has retained the kudivaram ever since and has not converted the land into ryoti land; or

(*iv*) land the entire kudivaram in which was acquired by the landholder before the first day of November, 1933 for valuable consideration from a person owning the kudivaram but not the melvaram, provided that the landholder has retained the kudivaram ever since and has not converted the land into ryoti land, and provided further that, where the kudivaram was acquired at a sale for arrears of rent the land shall not be deemed to be private land unless it is proved to have been cultivated by the landholder himself, by his own servants or by hired labour, with his own or hired stock, for a continuous period of twelve years since the acquisition of the land and before the commencement of the Madras Estates Land (Third Amendment) Act, 1936."

Section 3 (16) of the Act defines 'Ryoti land' as follows:

'Ryoti land' means cultivable land in an estate other than private land but does not include—

(*a*) beds and bunds of tanks and of supply, drainage, surplus or irrigation channels;

(*b*) threshing-floor, cattle-stands, village-sites, and other lands situated in any estate which are set apart for the common use of the villagers;

(*c*) lands granted on service tenure either free of rent or on favourable rates of rent if granted before the passing of this Act or free of rent if granted after that date, so long as the service tenure subsists."

Section 185 of the Act enacts a presumption that land in inam villages is not private land and reads as follows:

"185. When in any suit or proceeding it becomes necessary to determine whether any land is the landholder's private land, regard shall be had—

(1) to local custom,

(2) in the case of an estate within the meaning of sub-clause (*a*), (*b*), (*c*), or (*e*) of clause (2) of section 3, to the question whether the land was before the first day of July, 1898, specifically let as private land, and

(3) to any other evidence that may be produced.

Provided that the land shall be presumed not to be private land until the contrary is proved:

Provided further that in the case of an estate within the meaning of sub-clause (*d*) of clause (2) of section 3—

(*i*) any expression in a lease, patta or the like, executed or issued on or after the first day of July, 1918, to the effect or implying that a tenant has no right of occupancy or that his right of occupancy is limited or restricted in any manner, shall not be admissible in evidence for the purpose of proving that the land concerned was private land at the commencement of the tenancy, and

(*ii*) any such expression in a lease, patta or the like, executed or issued before the first day of July, 1918, shall not by itself be sufficient for the purpose of proving that the land concerned was private land at the commencement of the tenancy."

Section 6 is to the following effect:

"6. (1) Subject to the provisions of this Act, every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land situated in the estate of such landholder shall have a permanent right of occupancy in his holding.

Explanation (1).—For the purposes of this sub-section, the expression 'every ryot now in possession' shall include every person who, having held land as a ryot continues in possession of such land at the commencement of this Act.

* * * * * *"

The Subordinate Judge and the High Court have concurrently come to the conclusion, upon consideration of the evidence, that the lands in suit are not private lands but ryoti lands. On behalf of the appellant Mr. Kesava Iyengar conceded that onus is on the appellant to show that the lands are 'private lands' within the meaning of the Act, but the argument was stressed that the lower Courts have failed to take into account certain important documents filed on behalf of the appellant, *viz.*, Exhibits A-128, A-129 and the Paimash account dated 25th August, 1830, Exhibit A-147 and the Land Register, Exhibit A-134 In our opinion, there is no warrant for the argument advanced on behalf of the appellant. As regards Exhibit A-128 and A-129 it is apparent that apart from the question as to the identity of the land, they relate to a period previous to the grant of 1862 which alone constitutes the root of title of the grantee and there is no question of restoration or revival of any anterior right. The same reasoning applies to the Paimash account dated 25th August, 1830, Exhibit A-147 which cannot, therefore, be held to be of much relevance, this connection Reliance was placed on behalf of the appellant on Exhibit A-134, the Land Register for Pannymangalam which shows that in Orathur Thattimal Padugai which consists or Punjab (dry lands) and are rain-fed, the landholder (the Tanjore Palace Estate) owns both the warams (*Iruwaram* in vernacular) It was, argued for the appellant that the express 'Iruwaram' means that the land was owned as Pannai or private lands. Reference was made to the record of rights and Irrigation Memoir dated 13th January, 1935, Exhibit B-8 which shows that the lands are Iruwaram and there are no wet lands. But the use of the expression "Iruwaram" in these documents is not decisive of the question whether the land is private land of the appellant or not. Under section 3 (10) of the Act, private land comprises of two categories, private lands technically so-called, and lands deemed to be private lands. In regard to private lands technically so-called, it must be the domain or home-farm land of the landholder as understood in law. The mere fact that particular lands are described in popular parlance as *pannai*, *kambattam*, *sir*, *khas*, is not decisive of the question unless the lands so called partake of the characteristics of domain or home-farm lands. In our opinion the correct test to ascertain whether a land is domain or home-farm is that accepted by the Judicial Committee in *Yerlagadda Malikarjuna Prasad Nayudu* v. *Somayya*[1], that is, whether it is land which a zamindar has cultivated himself and intends to retain as resumable for cultivation by himself even if from time to time he demises for a season. The Legislature did not use the words 'domain or home-farm land' without attaching to them a meaning; and it is reasonable to suppose that the Legislature would attach to th se words the meaning which would be given to them in ordinary English. It seems to us that sub-clause (*b*) (i) of the definition is intended to cover those lands which come obviously within what would ordinarily be recognised as the domain or home-farm, that is to say, lands appurtenant to the landholder's residence and kept for his enjoyment and use. The home-farm is land which the landlord cultivates himself, as distinct from land which he lets out to tenants to be farmed. The first clause is, therefore meant to include and signify those lands which are in the ordinary sense of the word home-farm lands. The other clauses of the definition appear to deal with those lands which would not necessarily be rgarded as home-farm lands in the ordinary usage of the term; and with reference to those lands there is a proviso that lands purchased at a sale for

1. L.R. 46 I.A. 44: 36 M.L.J. 257. I.L.R. 42 Mad 400 (P.C.).

arrears of revenue shall not be regarded as private lands unless cultivated directly by the landlord for the required period It seems to us that the definition read as a whole indicates clearly that the ordinary test for 'private land' is the test of retention by the landholder for his personal use and cultivation by him or under his personal supervision No doubt, such lands may be let on short leases for the convenience of the landholder without losing their distinctive character; but it is not the intention or the scheme of the Act to treat as private those lands with reference to which the only peculiarity is the fact that the landlord owns both the varams in the lands and has been letting them out on short term leases There must, in our opinion, be something in the evidence either by way of proof of direct cultivation or by some clear indication of an intent to regard these lands as retained for the personal use of the landholder and his establishment in order to place those lands in the special category of private lands in which a tenant under the Act cannot acquire occupancy rights. In the present case there is no proof that the lands were ever directly cultivated by the landholder. Admittedly, soon after the grant of 1862 the estate came under the administration of Receivers, who always let out the lands to the tenants to be cultivated. In Exhibit B-8, the Record of Rights the lands are entered in column 5 as Punja or dry land In column 4 which requires the entry to be made as private land they are not entered as private lands It was argued for the appellant that the lands are sometimes called 'Padugai' and that the expression meant that the lands were within the flood bank and forming part of the river bed. But the description of the land as 'Padugai' is not of much consequence because they are also called as Orathur 'Thottam,' thottam meaning a garden where garden crops are raised to distinguish it from paddy fields. It appears that the lands actually lie between two rivers and comprise more than 100 acres, and by their physical feature cannot be 'padugai' in the sense in which the term is normally used. The argument was stressed on behalf of the appellant that leasing rights of the land were auctioned periodically. But the High Court has observed that one and the same tenant continued to bid at the auction and there was evidence that tenants continued to cultivate the lands without break or change, and the fact that there were periodical auctions of the lease rights did not necessarily deprive the tenants of the occupancy rights which they were enjoying. We accordingly hold that the appellant has not adduced sufficient evidence to rebut the presumption under section 185 of the Act that the lands in the inam village are not private lands and the argument of the appellant on this aspect of the case must be rejected.

For the reasons expressed we hold that the judgment of the Madras High Court dated 10th January, 1956, is correct and these appeals must be dismissed with costs—one set of hearing fee.

S.V.J. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—K. N. WANCHOO, *Chief Justice*, R. S. BACHAWAT, J. M. SHELAT, G. K. MITTER AND C. A. VAIDIALINGAM, JJ.

The Virudhunagar Steel Rolling Mills Ltd. .. *Petitioner**

v.

The Government of Madras .. *Respondent.*

Constitution of India (1950), *Articles* 32 *and* 226—*Dismissal of a petition under Article* 226 *by the High Court—When will operate as* res judicata—*Fresh application to Supreme Court for the same relief under Article* 32—*If barred.*

Civil Procedure Code (*V of* 1908), *section* 11—*Principles of* res judicata—*If applicable to writ proceedings under Constitution of India.*

Madras Electricity Act (*Taxation on Consumption*) *Act* (*IV of* 1962), *section* 12—*Validity—If hit by Article* 14 *of the Constitution.*

It is now well-settled law that once a petition under Article 226 of the Constitution of India is dismissed it will operate as a bar to the petitioner seeking the same relief under Article 32 of the Constitution before the Supreme Court, and the principles of *res judicata* would apply to such cases.

But where a writ petition is dismissed *in limine* and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If such an order is on the merits it would operate as a bar. If, however, the petition is dismissed *in limine* without passing a speaking order then such a dismissal cannot be treated as creating the bar of *res judicata.*

Where a writ petition under Article 226 of the Constitution is dismissed by the High Court without notice to the other side, but the order of dismissal is a speaking order and the petition is disposed of on merits, that would still amount to *res judicata* and would bar a petition for the same relief under Article 32 of the Constitution. The proper remedy of the party in such cases will be to come upon appeal, even though the High Court may not have issued notice to the other side. *Daryao* v. *State of U.P.*, (1962) 1 S.C.J. 702 : (1962) 2 M.L.J. (S.C.) 16 : (1962) 2 An.W.R. (S.C.) 16 : (1962) 1 S.C.R. 574, followed.

Obiter.—Section 12 of the Madras Electricity (Taxation on Consumption) Act, 1962 is not hit by Article 14 of the Constitution and the exemption granted thereunder is based on sound principles.

Petition under Article 32 of the Constitution of India for enforcement of the Fundamentals Rights.

R. Gopalakrishnan, Advocate, for Petitioner.

A. V. Rangam, Advocate, for Respondent.

The Judgment of the Court was delivered by

Wanchoo, C.J.—The petitioner is a Public Limited Company manufacturing bars, rods and agricultural implements out of scrap iron and steel and consumes energy of High Tension Supply for the purpose. Its case is that it is governed by the Industries (Development and Regulation Act, No. LXV of 1951, (hereinafter referred to as the Central Act), even though it did not require a licence under section 11 thereof in view of the notification issued by the Central Government under section 29-B by which industrial undertakings having fixed assets not exceeding rupees ten lakhs were not required to obtain a licence thereunder irrespective of the number of persons employed in such undertakings. The petitioner commenced functioning from February, 1963. The Madras Legislature passed the Madras

* W.P. No. 38 of 1967. 10th January, 1968.

Electricity (Taxation On Consumption) Act IV of 1962, (hereinafter referred to as the Madras Act) by which tax was imposed on the consumption of energy both of high tension and low tension electricity for various purposes at varying rates. Section 12 of the Madras Act however provided that where energy under High Tension Supply is consumed in the process of manufacturing or producing the principal product in any industrial undertaking licensed under the Central Act, no electricity tax shall be payable on the energy so consumed for a period of three years from the date of the commencement of the manufacture or production of the principal product in such undertaking.

The petitioner requested the Government of Madras for exemption from tax on the ground that even though it was not licensed under section 11 of the Central Act, it was governed by that Act. The Madras Government rejected its prayer on the ground that no exemption could be granted to undertakings which were not licensed under the Central Act as provided in section 12 of the Madras Act. Thereupon the petitioner filed a writ petition in the High Court of Madras attacking section 12 of the Madras Act under Article 14 of the Constitution and claiming that it should also have been granted exemption. The petition was dismissed by a learned Single Judge of the High Court without issue of notice by a short order to the effect that the petitioner was not entitled to the benefit of section 12 of the Madras Act and the validity of the section could not be attacked as the exemption provided was based on sound principles.

The petitioner then went in Letters Patent Appeal and the appeal was heard by a Division Bench of the High Court. The Division Bench held that the exemption was a concession and could not be claimed as a matter of right and that as section 12 did not provide for exemption in favour of undertakings like the petitioner's it could not claim exemption: The Division Bench also rejected the argument that Article 14 was applicable in this case. In consequence, the appeal was dismissed.

The present petition was filed by the petitioner soon after the appeal had been dismissed by the High Court and its contention before us is that it should have been given the exemption under section 12 of the Madras Act in view of Article 14 of the Constitution. The petitioner however did not file any appeal from the order of the Division Bench of the High Court. The petition has been opposed on behalf of the State of Madras and a preliminary objection has been taken that as the petitioner did not file an appeal from the order of the Division Bench, it is not open to it to file this petition in view of the decision of this Court in *Daryao* v. *The State of U.P.*[1]. It is further contended that section 12 of the Madras Act is not hit by Article 14.

We are of opinion that the preliminary objection must prevail. It is urged on behalf of the petitioner that the decision in the case of *Daryao*[1], shows that it was only when notice had been issued on a writ petition and it is decided on contest that the principle of *res judicata* would apply and a petitioner losing on such contest in the High Court would not be entitled to come to this Court under Article 32 of the Constitution. In this connection reference has been made to the observation at page 592, where this Court observed that

> "if a writ petition filed by a party under Article 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution."

But it was later observed on that very page that

> 'if the petition filed in the High Court under Article 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Article 32 except in cases where and if the facts thus found by the High

1. (1962) 1 S C J 702 : (1962) 2 An W.R (S.C.) 16 : (1962) 2 M.L J (S C) 16 : (1962) 1 S C R. 574.

Court may themselves be relevant even under Article 32. If a writ petition is dismissed *in limine* and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the petition is dismissed *in limine* without passing a speaking order then such dismissal cannot be treated as creating a bar of *res judicata*."

It is true that this Court said in that case that if a writ petition under Article 226 is dismissed on merits after contest it would bar a petition under Article 32 on the same facts But the latter observations at the same page show that that was not the only case in which there would be a bar of *res judicata*. Even where notice might not have been issued by the High Court and the writ petition dismissed *in limine*, the question whether such dismissal would bar a petition under Article 32 would depend upon the nature of the order dismissing it *in limine*. This is perfectly clear from the later observations made at page 592 in the same case. Where therefore a writ petition is dismissed without notice to the other side but the order of dismissal is a speking order and the petition is disposed of on merits, that would still amount to *res judicata* and would bar a petition under Article 32. The petitioners' only proper remedy in such a case would be to come in appeal from such a speaking order passed on the merits, even though the High Court may not have issued notice to the other side. What has been decided in *Daryao's case*[1], is that the High Court should have decided the petition on the merits by a speaking order. If that is done, it is immaterial whether notice was issued to the other side or not before such a decision was given. The bar arises not because there was a notice issued but because the High Court has dealt with the merits of the petition before it and has passed a speaking order even though no notice might have been issued.

In the present case the petition is clearly barred in view of the decision in *Daryao's case*[1]. The learned Single Judge who first dealt with the petition passed a short order dealing with the merits and stating that the validity of section 12 of the Madras Act could not be attacked as the exemption was based on sound principles. He therefore repelled the attack on section 12 of the Madras Act based on Article 14 of the Constitution. The petitioner then went in appeal to the Division Bench. The order of the Division Bench is more comprehensive than the order of the learned Single Judge and the Division Bench has dealt with the attack under Article 14 of the Constitution. It has rejected the contention that there was any element of hostile discrimination. It has also held that there was no arbitrary or unreasonable classification by section 12 of the Madras Act. It has finally held that it could not be said that there was no nexus between the conditions specified in the Madras Act and the Central Act which seeks, for reasons of national development and prosperity to license and supervise undertakings. The order of the Division Bench in appeal is clearly a speaking order dealing with the merits of the petition where only one point under Article 14 was raised. In our opinion it bars the making of the present petition under Article 32 on the same facts for the same relief based on the same Article of the Constitution. The petitioner did not appeal from the order of the Division Bench. The High Court made a speaking order dealing with the merits of the case and the fact that no notice was issued to the other side before such an order was passed is immaterial in the circumstances. We therefore uphold the preliminary objection.

We may add that if we were to go into the merits of the case ourselves we would see no reason to differ from the view taken by the Division Bench as to the application of Article 14

The petition is dismissed with costs.

R.M. —— *Petition dismissed.*

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1. (1962) 1 S C J 702 (1962) 2 M L J (S C) 16 (1962) 2 An W.R (S C) 16 (1962) 1 S C.R. 574.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—J C. SHAH, AND V. RAMASWAMI, JJ.

Kt N Rm Thenappa Chettiar and others .. *Appellents**

v.

N. S. Kr. Karuppan Chettiar and others .. *Respondents.*

Trusts—Contribution at the time of foundation of a trust by the donors—Donors, if joint founders of trust—Maintainability of suits for removal of trustee or for settlement of a scheme—Grounds of.

On the question whether the appellants are right in their contention that they were joint founders of the trust along with *C*,

Held that, it is not a correct proposition of law to state that every donor contributing at the time of foundation of a trust becomes a founder of the trust. It may be that in a particular case all the contributors of a trust fund become the founders of the trust itself, but the question when a contributor would become in law a joint founder of the trust would depend not merely upon the fact of his contribution but also upon the surrounding circumstances proved in the particular case and the subsequent conduct of the parties.

The appellants have failed to prove that all the contributors were the joint founders of the trust and that they were all in turns entitled to management in proportion to the amounts that they had contributed On the other hand, the evidence makes it quite clear that the contributories agreed to leave the management of the trust solely in the hands of *C* and subsequently of defendant No. 2, *C*'s grandson.

On the question whether the plaintiffs are entitled to ask for the settlement of a scheme even on the assumption that they were not co-founders of the trust,

Held that, the parties in this case have proceeded on the footing that the trust is a private trust, but the authorities establish that even in the case of a private trust a suit can be filed for the removal of the trustee or for settlement of a scheme for the purpose of effectively carrying out the objects of trust. If there is a breach of trust or mismanagement on the part of the trustee, a suit can be brought in a civil Court by any person interested for the removal of the trustee and for the proper administration of the endowment. In the present case the appellants being contributors to the trust are interested in the proper administration of the trust and they have a sufficient right to bring a suit in a civil Court in case there is mismanagement or breach of trust on the part of the managing trustee and for framing of a scheme

Appeal by Special Leave from the Judgment and Order dated the 4th April 1961 of the Madras High Court in Appeal No 99 of 1957

N. C. Chatterjee, Senior Advocate (*R. Thiagarajan*, Advocate for *R Ganapathy Iyer*, Advocate, with him), for Appellant

K Gopalachari and R Gopalakrishnan, Advocates, for Respondents

The Judgment of the Court was delivered by

Ramaswami, J—This appeal is brought on behalf of the plaintiffs, by Special Leave, against the judgment of the Madras High Court, dated 4th April, 1961 in Appeal No 99 of 1957.

In the suit which is the subject-matter of this appeal, the plaintiffs prayed for the settlement of a scheme in respect of a trust known as Sina Ravanna Mana Pana Sona Guru Puja Mutt at Pillamangalam Alagapuri, Tiruchinapalli District and for an account of the management of the trust by the late N S Chokalingam Chettiar

*C.A. No 355 of 1965. 31st January, 1968.

and for certain incidental reliefs The case of the plaintiffs was that the Trust was a joint foundation made on 12th November, 1919 by Sinnakaruppan Chettiar, father of plaintiffs 1 and 2 and grandfather of plaintiff 3, Raman Chettiar, father of plaintiff No. 4, Subramaniam Chettiar, plaintiff No 5, Perianan Chettiar, father of defendant No. 3 and Chokalingam Chettiar, father of defendant No. 1 and grandfather of defendant No. 2 It was said that the Trust was founded for conducting puja to God Vinayagar installed in the Mutt, by an Oduvar, to do special pujas for the Samayarcharyars, *viz*, Appah, Sundarar, Sambhandar and Manickavachakar and ordinary pujas to the other 63 Nayanmars on their birth days; to conduct a Thevaram Patasala, and feeding the pupils It was alleged that at the time of the foundation Chockalingam Chettiar contributed Rs 25,000 Sinnakaruppan Chettiar, Raman Chettiar, Subramaniam Chettiar and Perianan Chettiar contributing Rs 6,250 each. Hundies were passed by the four contributors for Rs 6,250 each in favour of the first defendant's father on 12th November, 1919 and they were cashed in due course. It was alleged that the joint-founders had at the time of foundation appointed Chockalingam Chettiar who was the largest contributor as the manager and executive trustee and the latter had constructed buildings for the Mutt and bought lands in Manakkarai village, Mannargudi taluk. On 27th November, 1943 Chockalingam Chettiar nominated defendant No 2, his grandson as the executive Trustee It was alleged by the plaintiffs that defendant No. 2 had stopped the pujas to the Nayanmars and Samavacharyas and had discontinued the Thevaram school and the feeding of the boys Several other acts of mis-management were alleged in the plaint The suit was mainly contested by the second defendant who alleged that the sole founder of the Mutt was the late N S Chockalingam Chettiar, his grandfather, who at first installed the Vinayakar image and also the 63 Nayanamars and established the pujas for the four Samayacharyars and the Nayanmars He was also the sole trustee and was in exclusive management from the foundation of the trust till 29th November, 1943 when by a registered instrument he appointed the second defendant and his descendants as hereditary trustees It was denied that the plaintiffs were joint-founders, though they had made contributions for the management of the Mutt. It was said that from the very date of contribution the plaintiffs never bargained for any rights as trustees but they accepted N. S. Chockalingam Chettiar as the sole trustee. The charge of mis-management was totally denied by the defendants and it was said that the trust was being maintained and conducted on a much grander scale than during the trusteeship of senior Chockalingam. It was asserted that the daily puja to the Vinayakar and the ordinary and special pujas to the Nayanmars and the Samayacharyars were all performed with scrupulous regularity. The suit was dismissed by the Subordinate Judge of Pudukkottai by his judgment dated 31st January, 1957. The finding of the Subordinate Judge was that the sole founder of the trust was the senior Chockalingam Chettiar who conducted it with the aid of moneys contributed by himself and other persons and that at the time of the foundation the other four contributors did not reserve for themselves any right in the trusteeship of the Mutt It was also found by the Subordinate Judge that the charges of mis-management were unfounded and no case was made out on behalf of the plaintiff for framing a scheme The judgment of the Subordinate Judge was affirmed by the High Court in Appeal No 99 of 1957 by its judgment dated 4th April, 1961. The High Court substantially agreed with the finding of the Subordinate Judge It was held by the High Court that the evidence made it quite clear that the contributors agreed to leave the management of the trust solely in charge of the senior Chockalingam The High Court also agreed with the Subordinate Judge that the plaintiffs had failed to establish that all the contributories were joint founders and that they were entitled to turns of management in proportion of their contributions The only matter on which the High Court expressed its disagreement with the Subordinate Judge was with regard to the date of the foundation of the trust The High Court expressed the view that the trust was founded in 1919 but the Subordinate Judge found that the trust had been founded much earlier, though it took a definite shape in the year 1919. As regards the charge of mis-management, the High Court agreed with the

Subordinate Judge and held that none of the charges had been established and accordingly there were no grounds made out for the framing of a scheme or the removal of the second defendant from the management of the trust.

The first question to be considered in this appeal is whether the appellants are right in their contention that they were joint founders of the trust along with the senior Chockalingam It was contended on their behalf that Exhibits A-1 and A-3 described the contributions of the sum of Rs 6,250 as having been made towards 1/8th ' Pangu ' or share Reference was also made to Exhibit A-5, ledger account of the Mutt in which the contribution is described as the share capital. It was pointed out by Mr N C Chatterjee that the vilasam of the trust S R M P A.S. supports the claim of the appellants that they were joint founders The High Court has, however, rightly pointed out that these two circumstances are not decisive. There is on the contrary an addition on behalf of the first plaintiff that the contributories were not treated as founders In the course of his evidence the 5th plaintiff as P W. 1 stated as follows :

> " As Chockalingam Chettiar held the largest number of shares the other four requested him to administer the suit trust maintain accounts and render accounts to the four other shares on demand... .... All the five pangudars were present when the decisions to found the charity was arrived at. We decided that senior Chockalingam should manage the charity to be founded None of us demanded that the pangudars should administer the trust by rotation. None of us suggested that the terms of the endowment should be reduced to writing. We wanted senior Chockalingam to consult us with reference to important matters pertaining to the administration We did not define the nature of the matters with reference to which we should be consulted.
>
> ....
>
> Since the inception of the trust no meeting of the five pangudars was ever held. Nor were minutes of such proceedings kept Chockalingam used to have informal consultations with us At no time, between 1919 and 1945, the year of senior Chockalingam's death did we ever call upon him to show us his accounts. Nor did he show us his accounts We never asked him to what the total income from the lands and buildings was I do not remember the particulars of information which senior Chockalingam voluntarily gave us "

The conduct of the parties subsequent to the foundation of the trust is also not consistent with the claim now put forward on behalf of the appellants. Senior Chockalingam acquired considerable properties between 1919 and 1945 on behalf of the trust Exhibit B-2, dated 23rd June, 1920, Exhibit B-3, dated 27th January, 1927, Exhibit B-5, dated 18th June, 1931, Exhibit B-6, dated 22nd June, 1931, Exhibit B-7, dated 4th January, 1934, Exhibit B-8, dated 2nd March 1934, Exhibit B-9 dated 30th September, 1934, Exhibit B-10, dated 30th September, 1934, Exhibit B-11, dated 6th June, 1936 and Exhibit B-12 dated 5th April, 1937 are all sale deeds solely in the name of the senior Chockalingam The mutt building had always stood in the name of the senior Chockalingam in the register of Alagapuri Panchayat Union The oral evidence adduced on behalf of the respondents which has been accepted both by the Subordinate Judge and by the High Court also shows that there was a total non-interference on the part of the plaintiffs in the management of Chockalingam till he appointed the second defendant as his succeeding trustee under Exhibit B-1 and there was a total non-interference also with the management of the second defendant after that date P W. 1 also admitted in his evidence that the second defendant was appointed as the successor of senior Chockalingam and at the time of the appointment all the plaintiffs and defendant No 3 agreed that defendant No 2 should be so appointed as the sole managing trustee If the plaintiffs had any right to manage the trust by turns, as they now claim, it is not likely that they would have agreed to the second defendant being appointed as the sole trustee in place of senior Chockalingam In our opinion, the High Court was right in reaching the finding that the plaintiffs have failed to establish that they were the

joint founders of the trust or that they were entitled in turns to management in proportion to their contributions

It is not a correct proposition of law to state that every donor contributing at the time of foundation of a trust becomes a founder of the trust It may be that in a particular case all the contributors of a trust fund become the founders of the trust itself, but the question when a contributor would become in law a joint founder of the trust would depend not merely upon the fact of his contribution but also upon the surrounding circumstances proved in the particular case and the subsequent conduct of the parties *In the matter of the Endowed Schools Act*, 1869—and *In the matter of the St. Leonard, Shoreditch, Parochial Schools*[1], it was held by the House of Lords that where a charity is established by subscriptions the original subscribers alone are the founders, and the later benefactions are on the footing of the original foundation. At page 308 of the Report Earl of Selborne, L C. stated:

"Now let us consider what is the reasonable manner of applying to such a charity the word 'founder' It is reasonably clear that not every subscriber or contributor could be a founder having control over the school, or capable within the meaning of the Act of Parliament of impressing on it, by his own act or by his own authority a denominational character It is also reasonably plain, when you have once started with a foundation in 1705, though by small beginnings, yet that everything afterwards added, every accretion to the original subscriptions, which was not an endowment for any new and special purpose, must be taken to be upon the footing of the original foundation; not a new foundation, but something contributed for the purpose of the original foundation. . . . . Now it is quite conceivable that a number of persons might have met at that time, and might have come to a common agreement as to the purposes for which they should subscribe and solicit subscriptions; and if that had been embodied in writing, and if they had solicited subscriptions on the footing that either they themselves were to make a law for the charity and give it statutes, or that this was to be done by others in a particular manner, or if in any original documents soliciting subscriptions there had been a written law laid down for the charity expressing the purposes for which it was to be founded, those persons so initiating the subscriptions, and so declaring the purpose for which they were made and solicited, might be regarded as founders within the meaning of this clause But it appears to their Lordships to be quite impossible to attribute that character to those who come after them—whether they contributed to the building fund or any other fund in aid of the existing charity or not. They did not found the charity; they found it existing, they merely aided and assisted it."

In *Settikara Venkatarama Chettiar* v *O P. Damodaram Chettiar*[2], there was a deed of trust executed by V in favour of nineteen persons known as Chettiathanakars which trated that he alone was unable to make and set up idols of Ramalingam and Choudeswari Amman in the Choudeswari Amman Temple Devasthanam built by him and that the nineteen persons agreed to raise a fund and to put up the idol in the temple and according to the agreement that they set up the idols of Ramalingam and Choudeswari Amman and they agreed to purchase property for endowing the temple, and the document then went on to state " that the nineteen persons should manage the temple from generation to generation." Funds were collected by V and by the nineteen persons mentioned in the document; they built the temple, installed the idols in it, and collected funds for the upkeep of the temple and managed the temple under the deed of trust. It was held by the Madras High Court that the deed of trust conferred the hereditary right to the trusteeship upon V and the nineteen Chettithanakars. At page 461 of the Report the High Court stated as follows

" If persons invite subscriptions on a representation that they would devote the subscriptions so collected to a particular purpose and they divert the subscrip-

1. (1884) L R 10 A C 304 2 (1925) 51 M.L J 457.

tions to some other purpose the subscribers have to object to the funds being diverted to other purposes than those for which they were collected. But so long as the subscribers do not object to the person or persons collecting subscriptions for building or endowing any particular institution, the person or persons so building or and endowing it have the right to provide for its management for all time to come. There is nothing in the evidence to show that the persons who gave subscriptions gave them on the understanding that the founders should not have the hereditary right of management All that appears from Exhibit A is, that subscriptions were collected, funds were raised, a temple was built and idols were installed and the management was in the hands of Venkatarama Chetti and others and all of them "

As we have already stated, the appellants have failed to prove that all the contributories were the joint founders of the trust and that they were all in turns entitled to management in proportion to the amounts that they had contributed On the other hand, the evidence makes it quite clear that the contributories agreed to leave the management of the trust solely in the hands of the senior Chockalingam and subsequently of defendant No 2. We are accordingly of the opinion that Mr N. C Chatterjee has been unable to make good his argument on this aspect of the case.

We proceed to consider the next question arising in this appeal, *viz*, whether the plaintiffs are entitled to ask for the settlement of a scheme even on the assumption that they were not co-founders of the trust. The parties in this case have proceeded on the footing that the trust is a private trust, but the authorities establish that even in the case of a private trust a suit can be filed for the removal of the trustee or for settlement of a scheme for the purpose of effectively carrying out the objects of the trust. If there is a breach of trust or mismanagement on the part of the trustee, a suit can be brought in a civil Court by any person interested for the removal of the trustee and for the proper administration of the endowment —(See, for example, *Pramatha Nath Mullick's case*[1], and *Manohar Mookerjee* v *Peary Mohan*[2], There are also authorities to the effect that a civil Court may frame a scheme in the case of a private endowment at the instance of the parties interested The question has been discussed by the Calcutta High Court in *Bimal Krishna's case*[3], and it was held in that case that a scheme for the administration of a private endowment can be framed by a civil Court Mookerjee, J. observed in that case that in India the Crown is the constitutional protector of all infants and as the deity occupies in law the position of an infant, the shebaits who represent the deity are entitled to seek the assistance of the Court in case of mismanagement, fraud or maladministration on the part of the shebait and to have a proper scheme for management framed for the administration of the private trust In *Pramatha Nath Mullick's case*[1], to which we have already made reference, the Judicial Committee itself directed the framing of a scheme in the case of a private endowment and the case was expressly remanded to the trial Courts for that purpose. In the present case the appellants being contributors to the trust are interested in the proper administration of the trust and, in our opinion, they have a sufficient right to bring a suit in a civil Court in case there is mismanagement or breach of trust on the part of the managing trustee and for framing of a scheme

But the question in the present appeal is whether the appellants have made out any grounds for framing of a scheme or for the removal of the second defendant from the management of the trust It was alleged by the appellants in the plaint that the trust had been mismanaged by the senior Chockalingam and by his grandson, 2nd defendant and both have been guilty of breach of trust The main charge levelled against defendant No 2 was the non-performance of the pujas and the closing down of the Thevara Patasala and the feeding of the pupils The Subordinate Judge has examined the evidence dealing with the charge and found that it was not established The High Court Court, upon analysis of the evidence, has reached the

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1. (1925) L R 52 I A 245 49 M L J 30
2. (1920) 24 C W N 478.
3. (1937) 41 C W N 728

same conclusion. It was also alleged by the appellants that account books, Exhibits A-9 and A-10 have been fabricated by defendant No 2 but the Subordinate Judge and the High Court both held that the allegation was not true Certain other charges were also levelled by the plaintiffs against defendant No. 2 and senior Chockalingam but the High Court as well as the Subordinate Judge found that these charges were not substantiated The question whether defendant No 2 or the senior Chockalingam was guilty of breach of trust or of acts of mismanagement is a question of fact and in view of the concurrent finding of both the lower Courts on this question we are of opinion that no ground has been made out on behalf of the appellants for framing of a scheme or for removal of defendant No. 2 from the office of the managing trustee It follows that the suit brought by the appellants has been rightly dismissed.

For these reasons we hold that the judgment of the High Court, dated 4th April, 1961 in Appeal No. 99 of 1957 is correct and this appeal must be dismissed with costs.

V.M.K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—G. K. MITTER AND K. S. HEGDE, JJ.

The Management, Chitavalsah Jute Mills Co., Ltd. .. *Appellant**

v.

The Workmen of Chitavalsah Jute Mills . *Respondents.*

Industrial dispute—Gratuity scheme—Introduction of in a Jute Mill—Propriety—Matters to be taken into consideration

After taking into consideration the importance of the jute industry for the national economy and the difficulties currently experienced by that industry, the Wage Board thought that it would be inappropriate to compel the industry to introduce a gratuity scheme for its employees. This recommendation relates to the industry as a whole and not to any individual industrial unit That recommendation cannot be understood as recommending that there should be no gratuity scheme for the employees in any particular unit in that industry. What is true of an industry as a whole need not necessarily be so in respect of a unit therein Therefore in considering the appropriateness or otherwise of the impugned gratuity scheme in the instant case what is relevant to find out is whether the appellant jute mill can bear the additional burden and whether in the circumstances of the case there is justification for throwing that burden on it

It is no more in controversy that in determining the conditions of service of the industrial workers in any unit, it is necessary to bear in mind the conditions prevailing in similar units in that region Generally the basis of such a determination is industry-*cum*-region.

It is well settled that in drawing up enduring schemes like gratuity schemes, temporary losses or gains should not be taken into consideration What is of the essence is the profit making capacity of the concern. In determining that question one has to take into consideration the paid up capital of the company, its reserves, its earnings in the past and its future prospects. A practical view of the question has to be taken

In the present case the Tribunal recommended a gratuity scheme for the staff of the appellant concern after taking into consideration its financial position as well as the fact that in the sister concern under the same management as the appellant there is such a scheme in existence It is not possible to hold that the Tribunal's conclusion was without any just basis

* C.A No 1627 of 1967. 2nd February, 1968.

Appeal by Special Leave from the Award, dated the 31st March, 1967 of the Industrial Tribunal, Andhra Pradesh in Industrial Dispute No 55 of 1965

H. R Gokhale, Senior Advocate (*D N Gupta*, Advocate, with him), for Appellant

M K Ramamurthi, Mrs. Shyamala Pappu and *Vineet Kumar*, Advocates, for Respondents.

The Judgment of the Court was delivered by

Hegde, J —This appeal has been brought to this Court by Special Leave It arises from the decision of the Industrial Tribunal, Andhra Pradesh, Hyderabad The only question that arises for decision is whether on the basis of the material on record there was any justification for framing a gratuity scheme for appellant's staff

The admitted facts are these : The appellant concern is having about 500 looms. It has a subscribed capital of a little over 35 lakhs. Its built up reserve is over thirty lakhs. In three out of the six years during the period 1960-65 it has suffered substantial losses Out of the remaining three years, in one year it made a profit of about Rs 45,000 in another year about Rs 13,000 and in 1962 over rupees twelve lakhs The annual expenses of the appellant's concern under the head 'salaries' wages and bonus are nearly 47 lakhs

It was found by the Tribunal that the appellant concern and the Nellimarla Jute Mills are sister concerns Both of them are under a single management, *viz.*, M/s. Mcleod & Company, Calcutta. They are located in the same region, the distance between the two being about 25 miles In Nellimarla Jute Mills a gratuity scheme of the staff is in existence and that in addition to provident fund benefits Our attention was not invited to any material on record to show that these finding are not correct. In the appellant concern also there is a provident fund scheme for the staff. The appellant in its counter affidavit filed before the Tribunal admitted that it had always been the policy of the management to introduce identical terms of employment for the workmen at Nellimrala and Chitavalsah From the material before us it is not possible to find out the financial position of the Nellimrala Mills We ascertained from the learned Counsel for the appellant that the appellant concern had made a profit of over a lakh of rupees in 1966 The Tribunal has found and that finding was not challenged before us that the additional burden to be borne by the appellant as a result of the gratuity scheme framed by it is about Rs 3,000 per year.

On behalf of the appellant two contentions were advanced in opposition to the proposed gratuity scheme. They are (1) the Wage Board was unable to recommend a gratuity scheme for the jute industry and hence there was no justification to frame the impugned scheme, and (2) in view of the losses incurred by the appellant during the years 1960-65, no additional burden should have been cast on it by introducing a gratuity scheme

So far as the Wage Board recommendation is concerned it pertains to the jute industry as a whole After taking into consideration the importance of the jute industry for the national economy and the difficulties currently experienced by that industry, the Wage Board thought that it would be inappropriate to compel the industry to introduce a gratuity scheme for its employees This recommendation relates to the industry as a whole and not to any individual industrial unit. That recommendation cannot be understood as recommending that there should be no gratuity scheme for the employees in any particular unit in that industry. What is true of an industry as a whole need not necessarily be so in respect of a unit therein That position in law was not disputed by Mr. Gokhale, learned Counsel for the appellant Therefore in considering the appropriateness or otherwise of the impugned scheme, we have to primarily consider its repercussion on the appellant. What is relevant to find out is whether the appellant can bear the additional burden and whether in the circumstances of the case there is justification for throwing that burden on it.

The tribunal has recommended a gratuity scheme for the staff of the appellant after taking into consideration its financial position as well as the fact that in the sister concern, *i e*, the Nellimarla Mills such a scheme is in existence It is no more in controversy that in determining the conditions of service of the industrial workers in any unit, it is necessary to bear in mind the conditions prevailing in similar units in that region. Generally speaking the basis for such a determination is industry-*cum* region.

The appellant concern is an economic unit Jute mills having 300 or more looms are considered as economic units The appellant has 500 looms Similarly the Nellimarla Mills have also got 500 looms As seen earlier, the appellant is a big concern Its paid up capital is over 35 lakhs Its reserve is nearly as much as its paid up capital This shows that in the past the appellant was a prosperous concern. It is true that it did suffer losses in some years in the recent past But the question is whether it is a temporary phase or not The tribunal has come to the conclusion that it is a passing phase It is well settled that in drawing up enduring schemes like gratuity schemes temporary losses or gains should not be taken into consideration What is of the essence is the profit making capacity of the concern In determining that question one has to take into consideration the paid up capital of the company, its reserves, its earnings in the past and its future prospects A practical view of the question has to be taken

In *National Iron and Steel Co. Ltd and others* v. *State of West Bengal and another*[1], this Court speaking through one of us (Mitter, J) quoted with approval the following passage in *Burhanpur Tapti Mills Ltd* v *B. T. Mills Mazdoor Sangh*[2].

" ....there are two general methods of fixing the terms of a gratuity scheme It may be fixed on the basis of industry-*cum*-region or on the basis of units Both systems are admissible but regard must be had to the surrounding circumstances to select the right basis Emphasis must always be laid upon the financial position of the employer and profit-making capacity whichever method is selected, and it must be further seen " whether the industrial Court was right in appraising the financial condition and the profit-making capacity of the company A scheme for gratuity no doubt imposes a burden on the finances of the concern but the pressure is *ex facie* distributed over the years for it is limited to the number of retirements each year The employer is not required to provide the whole amount at once. He may create a fund, if he likes and pay from the interest which accrues on a capitalised sum determined actuarially This is one way of providing the money Ordinarily the payment is made each year to those who retire To judge whether the financial position would bear the strain the average number of retirements per year must be found out. This is one part of the inquiry. The next part of the inquiry is to see whether the employer can be expected to bear the burden from year to year. The present condition of his finances, the past history and the future prospects all enter into the appraisal of his ability "

In *Calcutta Insurance Co., Ltd* v *Their Workmen*[3], this Court observed :

" On the financial aspect of a gratuity scheme, we were referred to the case of *Wenger & Co* v. *Their Workmen*[4]. There it was observed by this Court that the problem of the burden imposed by the gratuity scheme could be looked at in two ways One was to capitalise the burden on actuarial basis which would show theoretically that the burden would be very heavy, and the other was to look at the scheme in its practical aspect and find out how many employees retire every year on the average According to this Court, it was this practical approach which ought to be taken into account "

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1 (1967) 2 S C R 391 A I R 1967 S C 1206.

2 (1965) 1 L L J. 453 . (1965) 2 S C J 737: A.I.R. 1965 S.C. 839.

3. (1967) 2 S C R. 596 : A I R. 1967 S.C. 1286

4 (1963) 2 L L J. 403 : (1963) 2 S.C.R. (Supp.) 862 : A.I.R. 1964 S.C. 864.

In the light of the principles noted above and on the material placed before the tribunal it is not possible to hold that the tribunal's conclusion was without any just basis

For the reasons mentioned above, this appeal fails and the same is dismissed with costs

V K. — *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT —K N WANCHOO, *Chief Justice*, S M SIKRI, J. M. SHELAT, V BHARGAVA AND C A VAIDIALINGAM, JJ

Tarak Nath Ghosh .. *Appellant**

v

The State of Bihar and others .. *Respondents.*

Indian Independence Act (1947) (10 *and* 11 *Geo VI, c* 30), *section* 10—*Effect on the services constituted by the Secretary of State—Appellant ceased to be a member of that service, but continued to serve the Dominion of India and the Province of Bihar.*

All-India Services Act (*LXI of* 1951), *section* 3 *and Indian Police Service* (*Recruitment*) *Rules* (1954) *and All-India Services* (*Discipline and Appeal*) *Rules* (1957)—*Appellant included in the Indian Police Service under the Recruitment Rules of* 1954—*No bar to the Central Government to make a rule under section* 3 *and include him in the Indian Police Service.*

Civil Services (*Classification, Control and Appeal*) *Rules* (1930), *rule* 55—*Right of the appellant under rule* 55 *continued under Article* 314 *of the Constitution—Enquiry under rules of* 1955 *no way detrimental to the appellant as compared with an enquiry under the rules of* 1930

The Services constituted by the Secretary of State earlier disappeared with the passing of the Indian Independence Act, though persons who continued to serve thereafter under the Indian Dominion or any Province were entitled to certain rights in regard to remuneration, leave, pension and disciplinary matters There fore it has to be held that on the passing of the Indian Indpendence Act, the appellant ceased to be a member of the Service constituted by the Secretary of State; but he continued to serve the Government of India and the Province of Bihar, as a result of which certain rights relating to conditions of service and disciplinary matters, which were earlier applicable to him, were preserved At the time when the Indian Police (Cadre) Rules, 1950 were framed, the appellant was not a member of any regularly constituted Service and his position remained the same until under the Recruitment Rules of 1954 he was included in the Indian Police Service.

With effect from the date of enforcement of these Rules, he again became a member of a regularly constituted Service and he could be competently included in the service, because on that date he was only holding a cadre post, but was not a member of any other irregular service While he was simply holding a cadre post there was no bar to the Central Government making a rule under section 3 of the All India Services Act, 1951 (LXI of 1951) so as to include him in the Indian Police Service Therefore, the contention that All India Services (Discipline and Appeal) Rules, 1955 did not apply to the appellant must be rejected because when those rules came into force the appellant was already a member of the Indian Police Service which service was governed by those Rules.

It is clear that the preliminary enquiry under rule 55 of the Civil Services (Classification, Control and Appeal) Rules, 1930 was not required to be initiated or to be held by the Secretary of State in the case of a member of an All India

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* C.A. No. 2432 of 1966. 22nd February, 1968.

Service and it was only at the subsequent stage when the order of dismissal had to be passed that the Secretary of State was required to give an opportunity of showing cause to the Officer concerned under section 240 (3) of the Government of India Act.

Under Article 314 of the Constitution, the right that continued to enure to the benefit of the appellant was that the enquiry to be held into his conduct must comply with the requirements of rule 55 of the Rules of 1930 Therefore, an enquiry ordered under the Rules of 1955 is in no way detrimental to the interest of the person against whom the enquiry is held as compared with an enquiry under rule 55 of the Rules of 1930 The Rules of 1955 lay down the same type of opportunity to be given as did rule 55 of the Rules of 1930 Under both sets of rules, the enquiry could be ordered by the authority under whom the person concerned happened to be serving, so that, in the case of the appellant, the order made by the Government of Bihar for enquiry does not in any way violate the rights which the appellant possessed under rule 55 of the Rules of 1930 and which were preserved to him by Article 314 of the Constitution.

Appeal from the Judgment and Order dated the 4th October, 1966 of the Patna High Court in Civil Writ Jurisdiction Case No. 784 of 1965

B. C. Ghosh, Senior Advocate (*P. K. Chatterjee*, Advocate, with him), for Appellant.

V. A. Seyid Muhammad, Senior Advocate (*S P. Nayar*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Bhargava, J—The appellant, Tarak Nath Ghosh, was appointed by the Secretary of State for India to the Secretary of State's Service known as the Indian Police on 25th January, 1937 When agreement took place with the British Government for independence of India, the Central Government, on 21st October, 1946, in agreement with a number of Provincial Governments including the Government of Bihar constituted another Service known as the Indian Police Service Recruitment to this Indian Police Service began on 15th August, 1947, after India attained Dominion Status. Subsequently, on 23rd January, 1950, the Governor-General in consultation with the Provincial Governments, promulgated Rules for forming a cadre for the Police Officers The Rules, known as the Indian Police (Cadre) Rules, 1950, came into force on 23rd January, 1950, and laid down that a number of posts mentioned in the Schedule would be treated as cadre posts and no cadre post shall be filled otherwise than by a cadre officer. Amongst the cadre officers defined in the Rules were included members of the Indian Police and of the Indian Police Service. On 26th January, 1950, the Constitution of India came into force and provision was made in Article 312 (1) empowering Parliament by law to provide for the creation of one or more All-India Services common to the Union and the States, and to regulate the recruitment and conditions of service of persons appointed to any such service. Article 312 (2) laid down that the services known at the commencement of the Constitution as the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under this Article In pursuance of the power given to Parliament under this Article, Parliament passed an Act for constituting All-India Services That Act is the All-India Services Act, 1951 (LXI of 1951) (hereinafter referred to as " the Act "). The Act recognised the existence of the two All-India Services mentioned in Article 312 (2) of the Constitution and, by section 3, empowered the Central Government, after consultation with the Governments of the States concerned, to make Rules for the regulation of recruitment, and the conditions of service of persons appointed to an All-India Service Section 4 laid down that all rules in force immediately before the commencement of the Act and applicable to an All-India Service shall continue to be in force and shall be deemed to be Rules made under this Act. In exercise of the powers granted by section 3 of the Act, the Central Government promulgated the Indian Police Service

(Recruitment) Rules, 1954 Under these Rules, it was laid down that the Indian Police Service was to consist of the following persons, *viz*.—

(*a*) members of the Indian Police;

(*b*) members recruited to the Service before the commencement of these Rules and

(*c*) persons recruited to the Service in accordance with the provisions of these Rules

The Rules defined "member of the Indian Police" to mean a person who, having been appointed to the police service under the Crown in India, known as the Indian Police, continues on or after the commencement of these Rules, to serve under the Government of India, or a State Thus, under these Rules, persons appointed to the Indian Police, who had been appointed by the Secretary of State and had continued to serve the Government of India, became members of the Indian Police, and under clause 3 of the Rules, the Indian Police Service included these members of the Indian Police Subsequently, in exercise of the powers conferred by section 3 (1) of the Act, the Central Government, after consultation with the Governments of the States concerned, made Rules for regulating the discipline in the Indian Police Service. These Rules, which were enforced with effect from 1st September, 1955, came to be known as the All-India Services (Discipline and Appeal) Rules, 1955 (hereinafter referred to as "the Rules of 1955"). Rule 4 of these Rules was amended subsequently on 23rd July, 1960.

On 29th June, 1965, while the appellant was working as the Deputy Inspector-General of Police in Bihar, an order was made by the State Government placing the appellant under suspension pending an enquiry This order was partially amended by the Central Government by passing an order of suspension of the appellant in view of the enquiry instituted by the State Government. On 13th July, 1965, the appellant filed a writ petition under Article 226 of the Constitution in the High Court at Patna challenging these orders passed against him The order for institution of an enquiry made by the State Government, which had been directed in pursuance of rules 4 and 5 of the Rules of 1955, was challenged on two grounds One ground was that the appellant had never become a member of the Indian Police Service and these Rules did not, therefore, apply to him, so that no enquiry could be instituted against him under these Rules The second ground was that, in any case, in view of rule 55 of the Civil Services (Classification, Control and Appeal) Rules, 1930 (hereinafter referred to as "the Rules of 1930") read with Article 314 of the Constitution the Government of the State of Bihar had no power to order institution of an enquiry against the appellant even if it be held that he had become a member of the Indian Police Service The order of suspension was challenged on the sole ground that, if the enquiry itself had been invalidly instituted, the order of suspension automatically became invalid The High Court dismissed the writ petition holding on both points against the appellant and, consequently, the appellant has come up to this Court under certificate granted by the High Court.

The first contention put forward by learned Counsel for the appellant that the appellant never became a member of the Indian Police Service as deemed to have been created by virtue of Article 312 (2) of the Constitution has no force. It is true that the appellant was originally appointed on 25th January, 1937 to the Secretary of State's Service known as the Indian Police and when the Indian Police Service was first constituted on 21st October, 1946, persons, who mere members of the Secretary of State's Service known as the Indian Police, did not become members of this newly constituted Indian Police Service The Indian Police (Cadre) Rules, 1950 also did not bring about any merger of the two Services All that those Rules did was to constitute cadre posts which were to be filled by Officers belonging to either the Indian Police or the Indian Police Service as it existed at that time Article 312 (2) of the Constitution simply provided that the existing Indian Police Service constituted on 21st October, 1946, shall be deemed to be created by Parliament under that Article. Thereafter, Parliament passed the All-India Services Act, 1951 and under section 3

of the Act the Indian Police Service (Recruitment) Rules, 1954 were promulgated laying down that persons, who had been appointed to the Secretary of State's Service—Indian Police, were to be included in the Indian Police Service. Consequently, from the time that these Recruitment Rules of 1954 came into force, all persons, who had been appointed to the Secretary of State's Service—Indian Police became members of the Indian Police Service, so that, thereafter, they were governed by the provisions of the Act and the Rules framed thereunder. The submission of learned Counsel for the appellant was that the provisions in the Recruitment Rules of 1954 that the Indian Police Service shall consist, *inter alia*, of members of the Indian Police, could not make them members of the Indian Police Service, because, under the Act the only power that was conferred on the Central Government was to make Rules regulating recruitment to the Service, and conditions of service of porsons appointed to the Service, and did not empower the Government to include within the Service persons who were already members of another Service. The argument has to be rejected, because, in our opinion, the provision laying down that the Indian Police Service shall consist, *inter alia*, of members of the Indian Police, amounts to a rule recruiting the members of the Indian Police to this Indian Police Service. It may be mentioned that those persons, who were appointed to the Indian Police under the Crown before Independance, ceased to be members of any regularly constituted Service when the Indian Independence Act came into force in the year 1947. When independence was achieved by India, the Secretary of State and the Crown ceased to have any authority in India, so that no Service of the Secretary of State or the Crown could continue thereafter. Under the agreement that was entered into by the new Indian Government with the British Government, provision was made that members of the previous Secretary of State's Service could continue to serve the Government of India or a Provincial Government and certain rights were preserved to them if they continued to do so. There was, however, no provision that the old Secretary of State's Service would continue, so that with the passing of the Indian Independence Act, Secretary of State's Services like the Indian Civil Service and the Indian Police ceased to exist.

The effect of the Indian Indpendence Act on the Secretary of State's Service was considered in detail by this Court in *State of Madras and another* v. *K. M. Rajagopalan*[1], and it was held :

> "Thus, the essential structure of the Secretary of State's Service was altered and the basic foundation of the contractual-*cum*-statutory tenure of the service disappeared. It follows that the contracts as well as the statutory protection attached thereto came to an automatic and legal termination. . . . ."

The effect of the decision in that case was also noticed by this Court in the case of *R.P. Kapur* v. *Union of India and another*[2], where this Court held that in the case of *K.M. Rajagopalan*[1], it had been decided that:

> "the conferral of Independence on India brought about an automacitc and legal termination of service on the date of Independence. But all persons previoulsy holding civil posts in India are deemed to have been appointed and hence to continue in service, except those governed by 'general or special orders or arrangements' affecting their respective cases. The guarantee about prior conditions of service and the previous statutory safeguards relating to disciplinary action continue to apply to those who are thus deemed to continue in service but not to others."

In the latter case of *R. P. Kapur*[2], the Court proceeded further to take notice of section 10 of the Indian Independence Act under which every person appointed by the Secretary of State to a civil service of the Crown in India, who continued on and after the appointed day to serve under the Government of either of the new Dominions or of any Province or part thereof, was entitled to receive the same conditions of service as respects remuneration, leave and pension and the same rights as respects

1. (1955) 2 S.C.R. 541 at p 562.
2. (1964) 5 S.C.R. 431.

disciplinary matters or, as the case may be, as respects the tenure of his office, or rights as similar thereto as changed circumstances may permit as that person was entitled to immediately before the appointed day, *i e*, 15th August 1947 Thus, it was clearly recognised by this Court that the Services constituted by the Secretary of State earlier disappeared with the passing of the Indian Independence Act, though persons, who continued to serve thereafter under the Indian Dominion or any Province, were entitled to certain rights in regard to remuneration, leave, pension and disciplinary matters In view of this decision, it has to be held that, on the passing of the Indian Independence Act, the appellant ceased to be a member of the Service constituted by the Secretary of State, but he continued to serve the Government of India and the Province of Bihar, as a result of which certain rights relating to conditions of service and disciplinary matters, which were earlier applicable to him, were preserved At the time when the Indian Police (Cadre) Rules were framed, the appellant was not a member of any regularly constituted Service and his position remained the same until, under the Recruitment Rules of 1954, he was included in the Indian Police Service With effect from the date of enforcement of these Rules, he again became a member of a regularly constituted service and he could be competently included in that service, because on that date he was only holding a cadre post, but was not a member of any other regular service. While he was simply holding a cadre post, there was no bar to the Central Government making a Rule under section 3 of the Act so as to include him in the Indian Police Service. Consequently, the first ground of attack on behalf of the appellant that the Rules of 1955 did not apply to him must be rejected, because, when those Rules came in to force, the appellant was already a member of the Indian Police Service which service was governed by those Rules.

The second ground of attack on behalf of the appellant is based on the contention that under Article 314 of the Constitution the appellant was entitled to the same rights as respects disciplinary matters, or rights as similar thereto as changed circumstances permitted as the appellant was entitled to immediately before the commencement of the Constitution. According to the appellant, immediately before the commencement of the Constitution, he was governed in the matter of discipline by the Rules of 1930, so that the rights which he was entitled to under those Rules were preserved to him under Article 314. This proposition is not disputed on behalf of the respondents What is, ohwever, disputed is the interpretation sought to be put on behalf of the appellant on rule 55 and of the Rules of 1930. The appellant urged that, under rule 55 of those Rules, an enquiry against a member of the Indian Police could only be instituted at the instance of the authority entitled to pass an order of dismissal, removal or reduction and by no other authority On this ground, it was urged that until the Indian Independence Act came into force, an enquiry could only be ordered by the Secretary of State, whereas, thereafter, until the enforcement of the Constitution, the enquiry could be ordered by the Central Government only because, during these two periods, the Secretary of State and the Central Government were the appropriate autohrities entitled to pass orders of dismissal or removal. We are unable to accept this interpretation of rule 55 urged on behalf of the appellant. Rule 55 of the Rules of 1930 is as follows :—

> " Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, no order of dismissal, removal or reduction shall be passed on a member of a Service (other than an order based on facts which have led to his conviction in a criminal Court or by a Court Martial) unless he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time, to put in a written statement of his defence

> and to state whether he desires to be heard in person If he so desires or if the authority concerned so direct, an oral inquiry shall be held At that inquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called as he may wish, provided that the officer conducting the inquiry may, for special and sufficient reason to be recorded in writing, refuse to call a witness The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof"

It is true that the first sentence of this Rule purports to lay down the procedure where an order of dismissal, removal or reduction is sought to be passed In the next sentence, the Rule requires that the grounds on which it is proposed to take action must be reduced to the form of a definite charge or charges and they must be communicated to the person charged, together with other necessary material The person charged is then required to put in a written statement of his defence within a reasonable time and to state whether he desires to be heard in person After this stage comes the mention of the authority who is to take action by laying down that, if the person charged so desires or if the authority concerned so directs, an oral inquiry shall be held The argument is that the authority concerned referred to in this sentence must necessarily mean the authority entitled to pass the order of dismissal, removal or reduction We are unable to accept this submission The language used in rule 55 shows that that rule is only concerned with the holding of an enquiry and lays down the procedure for the enquiry It does not at all deal with the question of passing an actual order of dismissal, removal or reduction. At this time when the appellant was appointed to the Indian Police, the provision which prescribed the authority who could pass an order of dismissal in respect of the appellant was contained in sub-section (2) of section 240 of the Government of India Act, 1935, as a result of which the appellant could only be dismissed from service by the Secretary of State who had appointed him. Rule 55 of the Rules of 1930, which then applied to him, did not, however, require that the enquiry under that rule must be initiated by the Secretary of State. In fact, that rule made no mention at all of the authority who was empowered to pass the order of dismissal On the face of it, it is clear that the rule was confined to making provision for an enquiry whereafter, if an order of dismissal had to be made, the appropriate authority under section 240 (2) of the Government of India Act, 1935 had to take up the proceedings and pass the final order. The expression "authority concerned" in rule 55, in these circumstances, must clearly be interpreted as referring to the authority under which the officer concerned happens to be serving at the relevant time If the officer was serving under the Government of India, the Government of India or such officer thereof as may be competent in that behalf would be the authority to take proceedings under rule 55 and, in doing so, to initiate the proceedings also. If the officer happened to be serving under a Provincial Government, that Government or such officer thereof as may be competent in that behalf would be the authority concerned for initiating and holding the enquiry Thereafter, of course, if the officer happened to be a a member of the Secretary of State's Service, neither the Government of India nor the Provincial Government could pass an order of dismissal, and, on conclusion of the enquiry, the report necessarily would have to be submitted to the Secretary of State who alone could pass the order of dismissal At that stage, the officer was entitled to a fresh show-cause notice under section 240 (3) of the Government of India Act, 1935 as held by the Privy Council in the case of *High Commissioner for India and High Commissioner for Pakistan* v *I M. Lal*[1]. It is clear in these circumstances that the preliminary enquiry under rule 55 of the Rules of 1930 was not required to be initiated or to be held by the Secretary of State in the case of a member of an All-India Service, and it was only at the subsequent stage when the order of dismissal had to be passed that the Secretary of State was required to give an opportunity of showing cause to the officer concerned under section 240 (3) of the Government of

1. (1948) 2 M.L.J 55: (1948) F.C.R. 44 (1948) F.L.J. 23: (1948) 75 I.A. 225.

India Act. In this connection, we may take notice of the fact that the High Court has held that, as a matter of fact also, prior to the Independence of India, whenever an enquiry was initiated in the conduct of a member of one of the Secretary of State's Services, the order was made by the Government of India and not by the Secretary of State, so that even at that time the Secretary of State as well as the Government proceeded on this very interpretation of rule 55 which we are inclined to accept

The result of the view that we have taken is that, under Article 314 of the Constitution, the right that continued to enure to the benefit of the appellant was that the enquiry to be held in his conduct must comply with the requirements of rule 55 of Rules of 1930 We find that an enquiry ordered under the Rules of 1955 is in no way detrimental to the interest of the person against whom the enquiry is held as compared with an enquiry under rule 55 of the Rules of 1930 The Rules of 1955 lay down the same type of opportunity to be given as did rule 55 of the Rules of 1930 Under both sets of Rules, the enquiry could be ordered by the authority under whom the person concerned happened to be serving, so that, in the case of the appellant, the order made by the Government of Bihar for enquiry does not in any way violate the rights which the appellant possessed under rule 55 of the Rules of 1930 and which were preserved to him by Article 314 of the Constitution The second ground of attack also, therefore, fails.

The appeal is dismissed, but, in the circumstances of this case, we make no order as to costs

V.M.K. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—J C. SHAH, V. RAMASWAMI AND G. K MITTER, JJ.

Gorantla Thataiah .. *Appellant**

v.

Thotakura Venkata Subbaiah and others .. *Respondents.*

Succession Act (XXXIX of 1925), sections 59 and 61—Execution of will—Testator physically weak and in a delerious state of mind at the time of execution—Slow witted and below the average level of intelligence and understanding — Propounder taking prominent part in execution of will and having considerable influence over testator—Whether will executed in a sound and disposing state of mind—Validity of.

It is well established that in a case in which a will is prepared under circumstances which raise the suspicion of the Court that it does not express the mind of the testator it is for those who propound the will to remove that suspicion. What are suspicious circumstance must be judged in the facts and circumstances of each particular case. If, however, the propounder takes prominent part in the execution of the will which confers substantial benefits on him that itself is a suspicious circumstance attending the execution of the will and in appreciating the evidence in such a case, the Court should proceed in a vigilant and cautious manner.

Considering the evidence, in the light of the principles laid down in *Tyrrell* v. *Painton*, (1894) P 151, *Barry* v *Butling*, (1838) 2 Moo P C 480, 482, *Fulton* v. *Andrew*, (1875) L R 7 H L. 448 and *Sarat Kumari Bibi* v. *Sakhi Chand and others* L R. 56 I A 62 56 M L J 130 it was held that there is abundant testimony which proves that the testator was physically in a weak condition and that he was in a delerious state of mind at the time of the execution of the will The first defendant took a prominent part in summoning the attesting witnesses and the scribe and in procuring the writing materials for the execution of the will There is also evidence that Veeriah lost his father, Gangiah when he was hardly 10 years of age and after Gangiah's death the first defendant brought Rattamma and Veeriah

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*C A No 431 of 1965. 19th March, 1968.

to his house and was looking after them. The first defendant had therefore considerable influence over Veeriah and his mother Rattamma. There is also the circumstance that Veeriah was only 24 years of age at the time of the execution of the will and he was slow witted and below the average level of intelligence and understanding. Having regard to the cumulative effect of all the circumstances, it was held that the will was not executed by Veeriah in a sound and disposing state of mind and was not legally valid.

Appeal from the Judgment and Decree, dated the 22nd August, 1963 of the Andhra Pradesh High Court in Appeal No. 554 of 1959.

H. R. Gokhale, Senior Advocate, (*K. R. Chaudhuri*, Advocate, with him), for Appellant.

D. Narsa Raju and *S. T. Desai*, Senior Advocates (*Miss. A. Vedavalli* and *A. V. Rangam*, Advocates, with them), for Respondents.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought by certificate on behalf of the plaintiff from the judgment of the High Court of Andhra Pradesh in Appeal Suit No. 554 of 1959, dated 22nd August, 1963.

One, Gorantla Thataiah, as the sole plaintiff, filed O.S. No. 2 of 1957 in the Court of the Subordinate Judge, Bapatla for possession of certain properties which had been left by Gorantla Veeriah when he died issueless on 24th June, 1939. Originally, there were ten defendants in the suit. Defendant No. 1 is the maternal uncle of Veeriah and defendant No. 2 and defendant No. 3 are the sons of defendant No. 1. Defendants Nos. 4 to 8 were the alienees from defendant No. 1's family. Defendants Nos. 7, 9 and 10 did not contest the suit. Defendant No. 8 died in the course of the suit and his legal representatives were added as defendants 11 to 14. Defendants 1 to 3 contested the suit on the ground that defendant No. 1 became entitled to the properties of Veeriah under the will, Exhibit B-4, dated 17th June, 1939 which Veeriah executed in his favour. It was contended in the alternative that at the time when the reversion opened on the death of Veeriah's mother, Rattamma on 1st October, 1956, defendant No. 1 was the nearest heir and not the plaintiff, under the Hindu Succession Act (XXX of 1956) which had come into force on 17th October, 1956. The Additional Subordinate Judge, Bapatla held that the will was true and genuine but it was not legally valid as it was executed by Veeriah at a time when he had no testamentary capacity. It was also held that the Hindu Succession Act did not apply to the facts of the case. The Additional Subordinate Judge accordingly granted a decree for possession of properties except item No. 4 in favour of the plaintiff as against defendants Nos. 1 to 3, 6, 7 and 11 to 14. Defendants 1 to 3, 7, 11 and 13 took the matter in appeal to the High Court of Andhra Pradesh. The plaintiff also preferred a Memorandum of Cross-objections to the extent the trial Court's decree was against him. By its judgment, dated 22nd August, 1963, the High Court allowed the appeal, holding that the will, Exhibit B-4 was executed by Veeriah in a sound and disposing state of mind and that the will was not only true but was valid and binding upon the plaintiff. The High Court accordingly dismissed the suit. The Memorandum of Cross-objections was also dismissed.

The first question to be considered in this appeal is whether the will, Exhibit B-4, was true and genuine and was executed by Veeriah in a sound and disposing state of mind.

It is not disputed that one Gangiah died leaving his widow Rattamma and his only son through her called Veeriah and young daughter. The girl died without leaving any issue in the year 1932. Veeriah was a little boy and it is not disputed that he was below average in intelligence and understanding. Rattamma along with her son took up residence with her brother defendant No. 1 who was a man of great wealth and influence in the village, owning fifty acres of land, and outstanding credits to the extent of Rs. 20,000. Rattamma's husband had left properties to the

extent of 13 acres of land In spite of owning so much property Veeriah was engaged as a cow-boy in tending cattle. In June 1939, he had an attack of typhoid, became bed-ridden and ultimately died of the disease on 24th June, 1939 The case of the contesting defendants was that Veeriah executed the will, Exhibit B-4 on 17th June, 1939 that D W 4 wrote it and nine witnesses attested it, but the will was not registered in Veeriah's lifetime. On 15th October, 1939, defendant No 1 and Rattamma presented the will, Exhibit B-4 before the Sub-Registrar, Chirala for registration. The Sub-Registrar, however, refused to register the will by his order, Exhibit A-45 in W C No. 4 of 1939 Defendant No 1 preferred an appeal before the District Registrar, Guntur, but the appeal was dismissed. Defendant No 1 then filed O.S No 111 of 1940 in the Court of District Munsif, Bapatla, against Ramayya (father of defendants 9 and 10), the plaintiff and Rattamma for a direction for registration of the will The District Munsif returned the will to defendant No. 1 for want of pecuniary jurisdiction Defendant No 1 presented it to the Subordinate Judge, Bapatla and got it numbered as O S No 6 of 1941 The suit was ultimately dismissed by the Subordinate Judge on the question of limitation. Defendant No 1 and Rattamma filed O S No. 13 of 1942 in the Subordinate Judge's Court, Bapatla for a declaration that the will was genuine and valid Ramayya filed a written statement and the suit was ultimately decreed in favour of defendant No 1 and Rattamma. The present plaintiff, Gorantla Thataiah was, however, not a party to that suit.

In the will, Exhibit B-4, it is stated by the testator as follows

"... Typhoid condition has set in As no treatment has been effective in curing this condition I have lost confidence that I will survive Therefore I have wholeheartedly made the following disposition regarding my movable and immovable properties in order that there may be no obstruction in future from any source whatsoever.

That my mother Rattamma should be maintained comfortably for her lifetime and that in case there is disagreement between her and my maternal uncle, Venkatasubbayya and they decide to live separately, my mother, Rattamma, should enjoy the income of the property mentioned in 'B' Schedule for her lifetime without exercising any powers of disposition by way of gift, sale, etc., over the property and that after her lifetime the entire property mentioned in 'B' Schedule should devolve in my maternal uncle, Venkatasubbayya. My maternal uncle, Venkatasubbayya shall enjoy the entire properties mentioned in 'A' and 'B' Schedules with absolute powers of disposition by way of gift, sale, etc"

In the will it is mentioned that Veeriah had sold his land on 30th May, 1939 to defendant No. 4 and received an advance of Rs. 165 with the stipulation that the balance of sale price should be paid at the time of registration Veeriah also said that in case he did not live long enough, defendant No 1 should complete the sale transaction and receive the balance of price from defendant No 4 The will was written by one Ammanamanchi Sambiah, D W. 4 the karnam of the village There are 9 attesting witnesses of whom three are dead On behalf of the plaintiff two of the attestors P Ws 8 and 9 were examined and two attesting witnesses were examined as Court witnesses 1 and 2 On behalf of defendants two attesting witnesses D.Ws. 1 and 6 besides the scribe D W 4 gave evidence P.W. 8 deposed that the testator did not give any instructions or particulars for drafting the will The testator was very weak and in a delirious state and he was not in a position to put his thumb impresssion to the will P W 9 is stone-deaf and he could not give proper evidence. He did not remember if Veeriah was raving and was tearing his clothes. D Ws. 1, 4, 6 and 14 and C Ws 1 and 2 say that the testator was in a sound and disposing state of mind. It is the testator who gave instructions regarding the disposition of the properties D W 4 wrote the will and read it over to Veeriah who approved of it and put his thumb impression thereon The evidence of P Ws 8 and 9 is therefore clearly in conflict with the evidence of C Ws 1 and 2 and D Ws. 1, 4, 6 and 14 The evidence of C Ws 1 and 2 is interested It is admitted that C W. 1 is related to defendant No 1 and C W 2 is indebted to the first defendant to the extent of Rs 1,400 As regards D.Ws 1, 4 and 6, the trial Court has remarked that their

testimony is not impartial and we see no reason to take a different view as regards the effect of their testimony So far as D W 1 is concerned, he appears to have khatha dealings with the first defendant. D W 4 admitted that he and Venkataswamy were good friends and worked as karnam and Village Munsif for 30 years. There was a case of misappropriation against Venkataswamy and D.W. 4 deposed in his favour in that case It is in evidence that D W 6 is related to Ambati Veeriah who is married to the first defendant's niece With regard to P.Ws 8 and 9 the High Court has remarked that they had attested the will without any protest or adding any note of protest though the testator, Veeriah was not in a sound state of mind at the time of the execution of the will In our opinion, this circumstance is of no consequence and the High Court was not justified in rejecting the evidene of P Ws 8 and 9 on this ground alone On the other hand, there are two important features in the present case which throw a great deal of doubt as to whether the testator was in a sound and disposing state of mind at the time of the execution of the will. It is the admitted position that the first defendant took a prominent role at the time of the execution of the will by summoning the scribe and the attesting witness. It is stated by D W. 1 that the first defendant also procured the writing materials and the black ink for affixing the thumb impressions of the witnesses. It is also admitted that the will preferred the first defendant to the mother. Normally, the testator would have bequeathed all his property to the mother and would have also given her power to adopt a boy to perpetuate the lineage of the family. Instead the mother was given, in the will, a life interest in items 1 and 6 and the rest of the properties were given absolutely to defendant No 1 It is undisputed that the testator was 24 years of age at the time of the execution of the will and that he was far below the average level of intelligence and understanding and nobody was prepared to offer a girl in marriage to him. There is evidence that Veeriah was " lacking in wits " and that he was employed for tending cattle Further more, the testator was suffering from typhoid fever at the time of the execution of the will and he died a week thereafter *i e*, on 24th June, 1939. In Exhibit B-4 it is recited that the testator was ailing for about 15 days and had become delirious. According to D.W. 4 when he arrived Veeriah was lying on a cot and he was not in a position to sit up by himself. Both D Ws. 1 and 4 admit that the attesting witnesses and the scribe had all assembled and waited for nearly an hour. Both P.Ws. 8 and 9 say that at the time of the execution of the will Veeriah was in a delirious state. D Ws 1, 4, 6, 14 and C W 1 all admit that the testator was delirious on the day previous to the execution of the will and also subsequent to the day of the execution of the will. These witnesses, however, state that the testator was quite all right and in normal condition on the date of the execution of the will It is difficult to accept this part of the defence evidence. Considering that the condition of the testator became worse and he died a week thereafter it is difficult to accept the evidence of defence witnesses and of C W. 1 that the testator was in a sound state of mind on the date of the execution of the will but he was in a delirious state the day before and the day after the execution of the will In our opinion, the Subordinate Judge was right in his conclusion that the testator was physically weak and in a delirious mental state at the time of the execution of the will We think the High Court had no justification for reversing the view taken by the Subordinate Judge on this point.

It is well-established that in a case in which a will is prepared under circumstances which raise the suspicion of the Court that it does not express the mind of the testator it is for those who propound the will to remove that suspicion What are suspicious circumstances must be judged in the facts and circumstances of each particular case If, however, the propounder takes a prominent part in the execution of the will which confers substantial benefits on him that itself is a suspicious circumstance attending the execution of the will and in appreciating the evidence in such a case, the Court should proceed in a vigilant and cautious manner It is observed in Williams on " Executors and Administrators", Volume I, 13th Edition, page 92

" Although the rule of Roman Law that ' *Qui se scripsit haeredem* ' could take no benefit under a will does not prevail in the law of England, yet, where the person

who prepares the instrument, or conducts its execution, is himself benefited by its disposition, that is a circumstance which ought generally to excite the suspicion of the Court, and calls on it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased"

According to the decision in *Fulton* v *Andrew*[1], "those who take a benefit under a will, and have been instrumental in preparing or obtaining it, has thrown upon them the onus of showing the righteousness of the transaction". "There is however no unyielding rule of law (especially where the ingredient of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all further enquiry is shut out." In this case, the Lord Chancellor, Lord Cairns, has cited with approval the well-known observations of Baron Parke in the case of *Barry* v. *Butlin*[2] The two rules of law set out by Baron Parke are. "first, that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator";

"the second is, that, if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court and calls upon it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased"

In *Sarat Kumari Bibi* v *Sakhi Chand and others*[2], the Judicial Committee made it clear that:

"the principle which requires the propounder to remove suspicions from the mind of the Court is not confined only to cases where the propounder takes part in the execution of the will and receives benefit under it. There may be other suspicious circumstances attending on the execution of the will and even in such cases it is the duty of the propounder to remove all clouds and satisfy the conscience of the Court that the instrument propounded is the last will of the testator."

This view is supported by the following observations made by Lindley and Davey, L JJ, in *Tyrrell* v. *Painton*[3].

"The rule in *Barry* v. *Butlin*[1], *Fulton* v. *Andrew*[1], and *Brown* v. *Fisher*[5], is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will" (Lindley, L J).

"It must not be supposed the principle in *Barry* v. *Butlin*[3], is confined to cases where the person who prepares the will is the person who takes the benefit under it—that is one state of things which raises a suspicion, but the principle is that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator the Court ought not to pronounce in favour of it unless that suspicion is removed" (Davey, L J.).

It is in the light of these principles that the evidence adduced in this case will have to be considered As we have already pointed out, there is abundant testimony in this case which proves beyond doubt that the testator was physically in a weak

1. (1875) L R 7 H L 448
2. (1956) I A 62 · (1956) M L J 130
3. (1894) P 151, 157, 159
4. (1838) 2 Moo P C 480
5. (1890) 63 L T 465

condition and that he was in a delirious state of mind at the time of the execution of the will. It is admitted that the first defendant took a prominent part in summoning the attesting witnesses and the scribe and in procuring the writing materials for the execution of the will. There is also evidence that Veeriah lost his father, Gangiah when he was hardly 10 years of age and after Gangiah's death the first defendant brought Rattamma and Veeriah to his house and was looking after them The first defendant had therefore considerable influence over Veeriah and his mother Rattamma. There is also the circumstance that Veeriah was only 24 years of age at the time of the execution of the will and he was slow witted and below the average level of intelligence and understanding Having regard to the cumulative effect of all the circumstances we are of opinion that the will, Exhibit B-4 was not executed by Veeriah in a sound and disposing state of mind and was not legally valid and binding upon the plaintiff We accordingly set aside the finding of the High Court on this issue.

It is, however, not possible for us to finally dispose of this appeal because the High Court has not examined the second question arising in this case, namely, whether the Hindu Succession Act (XXX of 1956) is applicable to the case and whether defendant No 1 was the nearest heir to succeed to the estate of the deceased Veeriah in preference to all others including the appellant, defendants 9 and 10. We therefore consider it necessary that the case should go back to the High Court for hearing the parties afresh and recording a finding on this question and to submit it to this Court within three months from the date of receipt of the record by the High Court. The parties will not be allowed to give additional evidence in the case and the High Court will submit a finding on the evidence already adduced by the parties The appeal will be placed for further hearing before this Court after the finding is submitted by the High Court in accordance with the directions we have given.

S.V J. . ——— . *Finding called for regarding a question not examined by High Court.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—J. C. SHAH, V. RAMASWAMI AND G. K MITTER, JJ.

The State of Andhra Pradesh and another . *Appellants**

v.

P. Sagar .. *Respondent*

G. Latchanna *Intervener.*

Constitution of India (1950), *Article* 15 (1) *and* (4) *and Article* 29 (2) *and rules* 4-A *and* 5-A *of the Telangana and Andhra Rules and directions in respect of the President's Scouts and Guides—Reservation of seats for members of backward classes under rules* 4-A *and* 5-A *of the Telangana and Andhra Rules—Caste determining factor—Validity of—Whether falls within exception under Article* 15 (4)*—Power of Courts to determine whether by making law fundamental right is infringed, is not excluded—Determination on the materials placed before it—Test of validity of law lies not in the belief of the maker of law but in demonstration by evidence and argument before Courts that guaranteed rights is not infringed.*

Words and Phrases—" Class ".

The list prepared on the basis of reservations for socially and educationally backward classes is indisputably a list community-wise In the context in which it occurs the expression " class " means a homogenous section of the people grouped together because of certain likeness or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like In determining whether a particular section forms a class, caste cannot be excluded altogether But in the determination of

* C.A. No. 1336 of 1967. 27th March, 1968

a class a test solely based upon the caste or community cannot also be accepted. Clause (4) of Article 15, being an exception to clause (1), cannot be extended so as in effect to destroy the guarantee of clause (1) The Parliament has by enacting clause (4) attempted to balance as against the right of equality of citizens the special necessities of the weaker sections of the people by allowing a provision to be made for their advancement In order that effect may be given to clause (4), it must appear that the beneficiaries of the special provision are classes which are backward socially and educationally and they are other than the scheduled castes and Scheduled tribes and that the provision is made for their advancement Reservations may be adopted to advance the interests of weaker sections of society, but in doing so, care must be taken to see that deserving and qualied candidates are not excluded from admission to higher educational institutions The criterion for determining the backwardness must not be based solely on religion, race, caste, sex or place of birth, and the backwardness being social and educational must be similar to the backwardness from which the scheduled castes and scheduled tribes suffer

Article 15 guarantees by the first clause a fundamental right of far-reaching importance to the public generally Within certain defined limits an exception has been engrafted upon the guarantee of the freedom in clause (1), but being in the nature of an exception, the conditions which justify departure must be strictly shown to exist When a dispute is raised before a Court that a particular law which is inconsistent with the guarantee against discrimination is valid on the plea that it is permitted under clause (4) of Article 15, the assertion by the State that the officers of the State had taken into consideration the criteria which had been adopted by the Courts for determining who the socially and educationally backward classes of the society are, or that the authorities had acted in good faith in determining the socially and educationally backward classes of citizens, would not be sufficient to sustain the validity of the claim The Courts of the country are invested with the power to determine the validity of the law which infringes the fundamental rights of citizens and others and when a question arises whether a law which *prima facie* infringes a guaraneed fundamental right is within an exception, the validity of that law has to be determined by the Courts on materials placed before them By merely asserting that the law was made after full consideration of the relevant evidence and criteria which have a bearing thereon, and was within the exception, the jurisdiction of Courts to determine whether by making the law a fundamental right has been infringed is not excluded

Whether in the examination the correct criteria were applied is not a matter on which any assumption could be made especially when the list prepared is *ex facie* based on castes or communities and is substantially the list which was struck down by the High Court in *Sukhadev's case*, (1966) 1 An W R 294.

The validity of a law which apparently infringes the fundamental rights of citizens cannot be upheld merely because the law-maker was satisfied that what he did was right or that he believes that he acted in manner consistent with the constitutional guarantees of the citizen. The test of the validity of a law alleged to infringe the fundamental rights of a citizen or any act done in execution of that law lies not in the belief of the maker of the law or of the person executing the law, but in the demonstration by evidence and argument before the Courts that the guaranteed right is not infringed

Appeal by Special Leave from the Judgment and Order, dated the 7th October 1966 of the Andhra Pradesh High Court in Writ Petition No 1268 of 1966.

P Ram Reddy, Senior Advocate (*A. V. V. Nair*), Advocate with him, for Appellants.

K Narayana Rao and *G Narayana Rao*, Advocates, for Intervener

The Judgment of the Court was delivered by

Shah, J—Against the order passed by the High Court of Andhra Pradesh declaring invalid the "reservation for backward classes under Rule 4-A and 5-A respec-

tively of the Telangana and the Andhra Rules, and the directions in respect of the President's Scouts and Guides ", under Government Orders Nos 1135 and 1136—Health, Housing and Municipal Administration Department, dated 16th June, 1966 as modified by G.O. Ms 1880, dated 29th July, 1966 for the Telangana region, and by G.O.Ms 1786, dated 2nd August, 1966 for the Andhra Region, the State of Andhra Pradesh has appealed to this Court with Special Leave

The State of Andhra Pradesh is divided into areas—Telangana and Andhra areas. In the Telangana area there are two Medical Colleges having in the aggregate 270 seats for entrants to the medical degree course In Andhra area there are four Medical Colleges having in the aggregate 550 seats for new entrants. In admitting candidates for the medical degree course by Government Orders Nos. 1135 and 1136—Health, Housing and Municipal Administration Department, dated 16th June, 1966, seats were reserved for Central Government nominees for N C C, A C C, President's Scouts and Guides for candidates with sports and extra-curricular proficiency for children of ex-service army personnel, for children of displaced goldsmiths, for candidates for Scheduled Castes and Tribes, for women candidates, for candidates appearing from H S C Multipurpose I S C and P U.C. Examinations, and for candidates who had secured the M Sc and B Sc degrees. By Government order No. 1880, dated 29th July, 1966, twenty per cent. of the total number of seats were reserved for backward classes in each area, and pursuant thereto the Telangana Rules were amended by G O Ms. No 1785, Health and the Andhra Rules were amended by G O Ms. No. 1783, Health dated 2nd August, 1966 The validity of the Government orders Nos 1135 and 1136 was challenged on the ground that they infringed the fundamental freedoms guaranteed under Articles 15 (4) 16 (4), and 29 (2) of the Constitution The High Court held that in reserving seats for nominees of the Central Government and from other States for cultural scholars, for women, for graduates and for students from H S C and P.U C courses, no fundamental rights were infringed, but the reservations for members of the backward classes described in the list prepared by the Government of Andhra Pradesh were invalid

By Article 15 of the Constitution, as originally enacted, it was provided that:

> " (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
>
> (2) * * * * * *
>
> (3) Nothing in this article shall prevent the State from making any special provisions for women and children."

Article 29 (2) provided that.

> " No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them "

By Article 46, which occurs in Chapter IV relating to Directive Principles of State Policy the State was enjoined to promote the educational and economic interest of the weaker sections of the people, but Articles 15 and 29 as originally framed prohibited the making of any discrimination against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them In the *State of Madras* v. *Srimathi Champakam Dorairajan*[1], an order issued by the Government of the State of Madras fixing the number of seats for particular communities for selection of candidates for admission to the Engineering and Medical Colleges in the State was challenged on the ground that it violated the guarantee against discrimination under Article 29 (2) of the Constitution This Court held that the Government Order constituted a violation of the fundamental right guaranteed to the citizens of India by Article 29 (2) of the Constitution, notwithstanding the directive principles of State policy laid down in Part IV of the Constitution The Parliament thereafter added clause (4) in Article 15, by the Constitution (First Amendment) Act, 1951 providing that

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1 (1951) S C J 313 (1951) 1 M.L J 621 · (1951) S C R. 525

"Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes"

On 31st July, 1962, the State of Mysore, in supersession of all previous orders made under Article 15 (4) divided backward classes into two categories · backward classes and more backward classes, and reserved 68 per cent of the seats in the Engineering and Medical Colleges and other technical institutions for the educationally and socially backward classes and the Scheduled Castes and Scheduled Tribes, and left 32 per cent seats for the merit pool That order was challenged by a group of writ petitions under Article 32 of the Constitution before this Court This Court in *M R Balaji & others* v *State of Mysore*[1], held that the order passed by the State of Mysore "was a fraud on the constitutional power conferred on the State by Article 15 (4)" and was liable to be quashed, because the order categorised, contrary to the plain intendment of Article 15 (4), the backward classes on the sole basis of caste. A similar order G O.Ms No 1880, Health issued by the State of Andhra Pradesh on 21st June, 1963, notifying a list of castes for the purpose of selecting candidates from the backward classes in the Medical Colleges in the State of Andhra Pradesh was declared invalid by the High Court of Andhra Pradesh on the ground that the order which classified the backward classes solely on the basis of caste subverted the object of Article 15 (4) of the Constitution see *P. Sukhadev and others* v *The Government of Andhra Pradesh*[2].

On 3rd February, 1964, the previous order issued by the State of Andhra Pradesh was cancelled. Thereafter it is claimed by the State of Andhra Pradesh that it took steps to prepare a fresh list of backward classes consistently with the provisions of the Constitution. The Chief Secretary of the Government of Andhra Pradesh has sworn in his affidavit that the Council of Ministers appointed a Sub-Committee to draw up a list of backward classes, *inter alia*, for the purpose of admission of students to professional Colleges The Committee invited the Law Secretary and the Director of Social Welfare to attend the meetings of the Sub-Committee, and letters were written to the other States calling for information about the criteria adopted by those States for determining backward classes for purposes of Articles 15 (4) and 16 (4) of the Constitution, that after considering the replies received from the Chief Secretaries of the various States it was resolved that the existing list of backward classes pertaining to Andhra and Telangana areas be scrutinized with a view to selecting from that list those castes or communities which are "considered backward on account of the low standard of living, education, poverty, places of habitation, inferiority of occupations followed etc", that at another meeting it was resolved that the list of 146 backward communities prepared by the Director be rearranged in "the order of priority in consultation with the Law Secretary, taking into consideration the criteria given by the Law Secretary in his note to the Cabinet Sub-Committee and that in doing so such of the criteria as capable of being practically possible for consideration may be taken into account," and accordingly the Law Secretary and the Director of Social Welfare considered the representations made by certain communities to the Government from time to time and "drew up a list of the order of priority as called for by the Cabinet Sub-Committee," that thereafter the Cabinet Sub-Committee made its recommendations which were considered by the Council of Ministers on 4th July, 1966, and that the Council of Ministers considered the social, educational and economic conditions of the backward classes named in the lists submitted to them, and dealt with each individual class and deleted certain items or classes in the lists, changed the denomination of certain classes "for the more precise effectuation of concessions to those classes only who really need them", and consolidated the backward classes into one list, ruling out the priorities suggested by the Director of Social Welfare in accordance with the opinion of the Cabinet Sub-Committee, and thereafter published resolution No G O. 1880 pursuant to which the rules were amended reserving 20 per cent of the seats for the backward classes mentioned in the list prepared by the Cabinet of the State.

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1. (1963) 1 S.C R. (Supp.) 439: A.I.R. 1963 S.C. 649. 2. (1966) 1 An.W.R. 294.

The list prepared on the basis of reservations for socially and educationally backward classes is indisputably a list community-wise On behalf of the petitioners it was contended in the High Court that the Government of Andhra Pradesh had adopted the same list of backward classes which was struck down by the High Court in *P. Sukhadev's case*[1], with some slight modifications, and the new list also having made a reservation in favour of castes and not classes, it infringed the guarantee under Article 15 (1) On behalf of the State it was urged that caste is one of the relevant tests in determining backwardness, and cannot be ignored in determining the socially and educationally backward classes; if a group has been classified as backward on other relevant considerations, the classification is not liable to be challenged as invalid on the ground that for the purpose of classifying, the designation of castes is given. The High Court held that the earlier G O. was struck down in *P. Sukhadev's case*[1], on the ground that it was based on caste alone and since the G.O. under challenge was again prepared on the same basis it could not be sustained as falling within the exception provided in Article 15 (4) Counsel for the State contends that the High Court erred in holding that the impugned rules reserving seats for backward classes made caste the determining factor.

In the context in which it occurs the expression " class " means a homogenous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religions and the like In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of a class a test solely based upon the caste or community cannot also be accepted. By clause (1), Article 15 prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. By clause (3) of Article 15 the State is, notwithstanding the provision contained in clause (1), permitted to make special provision for women and children. By clause (4) a special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes is outside the purview of clause (1). But clause (4) is an exception to clause (1). Being an exception, it cannot be extended so as in effect to destroy the guarantee of clause (1). The Parliament has by enacting clause (4) attempted to balance as against the right of equality of citizens the special necessities of the weaker sections of the people by allowing a provision to be made for their advancement In order that effect may be given to clause (4), it must appear that the beneficiaries of the special provision are classes which are backward socially and educationally and they are other than the Scheduled Castes and Scheduled Tribes, and that the provision made is for their advancement Reservation may be adopted to advance the interests of weaker sections of society, but in doing so, care must be taken to see that deserving and qualified candidates are not excluded from admission to higher educational institutions. The criterion for determining the backwardness must not be based solely on religion, race, caste, sex, or place of birth, and the backwardness, being social and educational must be similar to the backwardness from which the Scheduled Castes and the Scheduled Tribes suffer. These are the principles which have been enunciated in the decision of this Court in *M. R. Balaji's case*[2] and *R. Chitralekha and another* v. *State of Mysore and others*[3], In *R. Chitralekha's case*[3], Subba Rao, J., speaking for the majority of the Court observed at page 388:

" The important factor to be noticed in Article 15 (4) is that it does not speak of castes, but only speaks of classes If the makers of the Constitution intended to take castes also as units of social and educational backwardness, they would have said so as they have said in the case of the Scheduled Castes and the Scheduled Tribes. Though it may be suggested that the wider expression " classes " is used in clause (4) of Article 15 as there are communities without castes, if the intention was to equate classes with castes, nothing prevented the makers of the Constitution from using the expression "backward classes or castes." The juxta-

1. (1966) 1 An.W R 294.
2. A.I.R. 1963 S.C. 649.
3. (1964) 6 S.C R. 368.

position of the expression " backward classes " and " Scheduled Castes " in Article 15 (4) also leads to a reasonable inference that the expression " classes " is not synonymous with castes. It may be that for ascertaining whether a particular citizen or a group of citizens belong to a backward class or not, his or their caste may have some relevance, but it cannot be either the sole or the dominant criterion for ascertaining the class to which he or they belong "

In a recent judgment of this Court *P Rajendran and others* v. *The State of Madras and others*[1] Wanchoo, C J, speaking for the Court observed.

" ....if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15 (1) But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15 (4) * * * * It is true that in the present cases the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was the sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward citizens "

That case makes no departure from the rule enunciated in the earlier cases

The list dated 21st June, 1963, of castes prepared by the Andhra Pradesh Government to determine backward classes for the purpose of Article 15 (4) was declared invalid by the High Court of Andhra Pradesh in *P Sukhadev's case*[2] A fresh list was published under the amended rules with some modifications, but the basic scheme of the list was apparently not altered. It is true that the affidavits filed by the Chief Secretary in the High Court and the Director of Social Welfare in this Court have set out the steps taken for preparing the list of backward classes. It is also stated in the affidavit of the Director of Social Welfare that he considered the representations made to him, consulted the Law Secretary and certain publications relating to the study of backward classes, *e g*, Thurston's " Caste and Tribes " and Sirajul Hasan's " Castes and Tribes," and made his recommendations which were modified by the Sub-Committee appointed by the Council of Ministers and ultimately the Council of Ministers prepared a final list of backward classes. But before the High Court the materials which the Cabinet Sub-Committee or the Council of Ministers considered were not placed, nor was any evidence led about the criteria adopted by them for the purpose of determining the backward classes. The High Court observed .

" A perusal of this affidavit (Chief Secretary's affidavit) as well as that of the Director of Social Welfare, * * * which are filed on behalf of the Government do not say what was the material placed before the Cabinet Sub-Committee or the Council of Ministers, from which we could conclude that the criteria laid down by their Lordships of the Supreme Court have been applied in preparing the list of backward classes "

After referring to the opinion of the Law Secretary and the views of the Director of Social Welfare they observed :

" ..... .we are not able, to ascertain whether any material, and if so, what material was placed before the Cabinet Sub-Committee, upon which the list of backward classes was drawn. On the other hand, it is stated that the Law Secretary and the Director of Social Welfare sat together and drew up a list, the former specifying the legal requirements and the latter as an expert advising on the social and educational backwardness of class or classes "

It was urged before the High Court that expert knowledge of the Director of Social Welfare and of the Law Secretary was brought to bear upon the consideration of the relevant materials in the preparation of the list and they were satisfied that the correct tests were applied in the determination of backward classes and on that

1. W.Ps. Nos. 194 of 1967 and others decided on 17th January, 1968.
2. (1966) 1 An.W.R. 294.

account the list should be accepted by the High Court The High Court in dealing with the argument observed

" ..... the impugned backward classes list cannot be and has not been sustained by the Government as coming within the exception provided in Article 15(4) on any material placed before this Court In fact, there is a total absence of any material, from which we can say that the Government applied the criteria enunciated by their Lordships of the Supreme Court in the above referred cases, in preparing the list of backward classes We cannot accept the contention of the learned Advocate-General that 'once there is proof that the Government *bona fide* considered the matter it is sufficient' Acceptance of this argument would make for arbitrariness, absolving the party on whom the burden lies of the duty of discharging it The mere fact that the act is *bona fide* and that there was total absence of *mala fide*, is not relevant"

Article 15 guarantees by the first clause a fundamental right of far reaching importance to the public generally. Within certain defined limits an exception has been engrafted upon the guarantee of the freedom in clause (1), but being in the nature of an exception, the conditions which justify departure must be strictly shown to exist. When a dispute is raised before a Court that a particular law which is inconsistent with the guarantee against discrimination is valid on the plea that it is permitted under clause (4) of Article 15, the assertion by the State that the officers of the State had taken into consideration the criteria which had been adopted by the Courts for determining who the socially and educationally backward classes of the Society are, or that the authorities had acted in good faith in determining the socially and educationally backward classes of citizens, would not be sufficient to sustain the validity of the claim. The Courts of the country are invested with the power to determine the validity of the law which infringes the fundamental rights of citizens and others and when a question arises whether a law which *prima facie* infringes a guaranteed fundamental right is within an exception, the validity of that law has to be determined by the Court on materials placed before them By merely asserting that the law was made after full consideration of the relevant evidence and criteria which have a bearing thereon, and was within the exception, the jurisdiction of the Courts to determine whether by making the law a fundamental right has been infringed is not excluded.

The High Court has repeatedly observed in the course of their judgment that no materials at all were placed on the record to enable them to decide whether the criteria laid down by this Court for determining that the list prepared by the Government conformed to the requirements of clause (4) of Article 15 were followed On behalf of the State it was merely asserted that an enquiry was in fact made with the aid of expert officers and the Law Secretary and the question was examined from all points of view by the officers of the State, by the Cabinet Sub-Committee and by the Cabinet. But whether in that examination the correct criteria were applied is not a matter on which any assumption could be made especially when the list prepared is *ex facie* based on castes or communities and is substantially the list which was struck down by the High Court in *P. Sukhadev's case*[1], Honesty of purpose of those who prepared and published the list was not and is not challenged, but the validity of a law which apparently infringes the fundamental rights of citizens cannot be upheld merely because the law maker was satisfied that what he did was right or that he believes that he acted in manner consistent with the constitutional guarantees of the citizen The test of the validity of a law alleged to infringe the fundamental rights of a citizen or any act done in execution of that law lies not in the belief of the maker of the law or of the person executing the law, but in the demonstration by evidence and argument before the Courts that the guaranteed right is not infringed.

The appeal therefore fails and is dismissed.

S.V.J. ——— *Appeal dismissed.*

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1. (1966) 1 An.W.R. 294.

THE SUPREME COURT OF INDIA.

(Original/Civil Appellate Jurisdiction)

PRESENT —K N WANCHOO, *Chief Justice*, R S BACHAWAT, J. M SHELAT, G. K MITTER AND C.A. VAIDIALINGAM, JJ

Minor P. Rajendran and others . *Petitioners* *

v.

The State of Madras and others *Respondents.*

and

K M Sathakathulla . *Appellant*

v

The Director of Medical Education, Madras and others *Respondents.*

Constitution of India (1950), *Articles* 15 (1) *and* 15 (4)—*Interpretation—Reservation, if could be based on caste only—Caste also a class of citizens—If caste as a whole socially and educationally backward, reservation valid within the meaning of Article* 15 (4).

Madras Educational Rules, Appendix 17-*A, Group III, rule* 8—*Districtwise allocation of seats for the socially and educationally backward classes—Provision for "nativity claimed" inform of application, if a camouflage for discriminating on the ground of place of birth*

Madras Educational Rules, Appendix 17-*A, Group III, rule* 8—*Districtwise allocation of seats for the socially and educationally backward classes—Rule* 8, *if violative of Article* 14 *of the Constitution.*

Madras Educational Rules, Appendix 17-*A, Group III—Framing of rules for admission to medical colleges controlled by Government—If in consonance with the University Act and Rules framed thereunder.*

On the question whether rule 5 which provides for reservation for socially and educationally backward classes and which lays dowr that for the purpose of this Rule "Socially and Educationally backward Classes" will mean those classes which have been specified in Group III of the revised Appendix 17-A to the Madras Educational Rules violates Article 15 of the Constitution, *held*, that if reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would violate Article 15 (1). But, a caste is also a class of citizens and if caste as a whole is socially and educationally backward, the reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15 (4). In this case, though the list is prepared castewise the castes included therein are as a whole educationally and socially backward and therefore the list is not violative of Article 15. The challange of rule 5 cannot, therefore, be sustained.

Even though there may be substance in the charge that the complicated and confusing method of selecting candidates on the basis of *Nativity* has been provided in order to get over the prohibition in Article 15 (1) by a camouflage, it cannot be said that there is a clear violation of Article 15 (1) for the district which the candidate may claim does not depend upon the place of his birth. Therefore, rule 8 which provides for districtwise distribution of seats according to population of the district cannot be struck down on the ground that it discriminates on the basis of place of birth of the candidate concerned.

The question whether districtwise allocation is violative of Article 14 will depend on what is object to be achieved in the matter of admission to Medical Colleges. As the object to be achieved is to get best talent for admission to professional Colleges, the allocation of seats districtwise has no reasonable relation with the object to be achieved . If anything such allocation will result in many cases in the object being destroyed and if that is so the classification, even if

* W P. Nos 194, 196 and 202 of 1967 and C A. No 1456 of 1967. 17th January, 1968.

S—16

reasonable, would result in discriminations inasmuch as better qualified candidate from one may be rejected while less qualified candidate from the other districts may be admitted from either of the two sources There is no justification for districtwise allocation which results in discrimination, even assuming that the candidates from Madras City will get a larger number of seats in proportion to the population of the State, but there is also no districtwise classification which is being justified by the State on territorial basis in these cases violative of Article 14 for no justification worth the name in support of classification has been made out. Therefore rule 8 which provides for districtwise allocation is bad, as it violates Article 14.

The Government was entitled to frame Rules for admission to Medical College controlld by it subject to the Rules of the University as to the eligibility and qualification This was what was done in this case and therefore the selection cannot be challenged on the ground that it was not in accordance with the University Act and the Rules framed thereunder.

Petitions under Article 32 of the Constitution of India for enforcement of the Fundamental Rights and Appeal by Special Leave from the Judgment and Order dated the 16th August, 1967 of the Madras High Court in Writ Appeal No 308 of 1967

H R. Gokhale, Senior Advocate (*Mrs. Shyamala Pappu, M. K. Ramamurthi* and *Vineet Kumar*, Advocates, with him), for Petitioner (In W.P. No 194 of 1967).

M K. Ramamurthi, Mrs. Shyamala Pappu and *Vineet Kumar*, Advocates, for Petitioners (In W.Ps. Nos. 196 and 202 of 1967).

M R M. Abdul Karim and *K. Rajendra Chaudhuri*, Advocates, for Appellant (In C A. No 1456 of 1967).

C K. Daphtary, Attorney-General for India (*G. Ramanujam* and *A.V. Rangam*, Advocates, with him), for Respondents (In W.Ps Nos. 194 and 196 of 1967), Respondents Nos 2 to 6 (In C. A No. 202 of 1967) and Respondent No. 1 (In C A. No. 1456 of 1967)

C K. Daphtary, Attorney-General for India and *K. N. Mudaliar*, Advocate-General for the State of Madras (*A. V. Ragam* and *G Ramanujam*, Advocates, with them), for Respondent No 1 (In W.P. No. 202 of 1967).

The Judgment of the Court was delivered by

Wanchoo, C J.—The three petitions and the civil appeal challenge the same order of the State of Madras by which Rules were promulgated for selection of candidates for admission to the First Year Intergrated M B.B.S. Course. We shall briefly refer to the provisions of the Rules to understand the attack made thereon. It appears that there was a large rush of candidates for admission to the medical colleges in the State of Madras while the seats therein were limited. In consequence, the State of Madras which runs these colleges framed Rules for admission to them It is not necessary to refer to all the Rules and we shall confine ourselves to those Rules which have a bearing on the challenge made in these cases. Rule 2 provides for reservation of 10 seats for certain categories. We are however not concerned with it as it is not challenged. Rule 3 provides for appointment of a Selection Committee of not more than three persons. The Committee has to interview all candidates who are qualified and eligible for admission to the course and the interview is for verifying the data and allotting marks for extra curricular activities. Rule 4 provides for reservation of seats for Scheduled Tribes and Scheduled Castes, with which also we are not concerned in the present cases Rule 5, which is one of the rules under challenge, provides for reservation for socially and educationally backward classes, and lays down that for the purpose of this rule "socially and educationally backward classes" will mean those classes which have been specified in Group III of the revised Appendix 17-A to the Madras Educational Rules, issued with G.O. (Ms.) 839, Education, dated 6th April, 1951, as subsequently amended. Rule 6 provides for reservation

for women, which is also not under challenge and the remaining seats, under rule 7, go to the general pool available to all

Rule 8 which is another rule under challenge, provides that the seats reserved in the general pool and the seats reserved for the socially and educationally backward classes will be allocated among the various districts on the basis of the ratio of the population of each district to the total population of the State. This districtwise allocation will not apply to seats reserved for Scheduled Tribes and Scheduled Castes provided under rule 5 Then follows rule 9 as to the procedure for selection and qualifications of candidates Rule 10 (*d*) provides for a maximum of 75 marks for extra curricular activities which have been specified under five heads Further the Rules also prescribe the form of application, and as the selection is on a districtwise basis, the form has a column to the effect : " *Nativity Claimed* ". It further appears from the form that nativity depends on the S.S.L C. Register *i e.*, the district from which the candidate passed the S S L C. Examination, or on the nativity certificate of parents Further for the purpose of nativity, the place where the candidate's parents were born or the place where they possessed immovable property has to be considered. The candidate may choose the district from which he passed the S S.L.C. Examination, but he may, in the alternative, choose some other district on the ground of nativity, and this choice leaves it open to him to choose the district of permanent residence of the father or the mother. Further the form of certificate shows that where the parents are dead, even the guardian's nativity can bethe basis of the district which a candidate may claim

On the basis of these rules, a number of Selection Committees were appointed, each consisting of three members It is not in dispute that the three members of the Selection Committee did not sit together to interview candidates ; each member was allotted 25 marks out of the total of 75 prescribed for the interview and interviewed each candidate separately This method of selection has also been attacked as against the Rules.

Four main contention have been raised before us in these cases It has been urged that rule 5, which provides for reservation for socially and educationally backward classes is bad, as it violates Article 15 of the Constitution on the ground that it is based entirely on consideration of caste. The second attack is on the districtwise allocation under rule 8 on the ground that it violates Articles 14 and 15 It is urged that in effect the selection is made to a large extent on the basis of the place of birth and this violates Article 15 It is also urged that districtwise allocation of seats for medical colleges is discriminatory, for such allocation has no nexus with the object of selection, namely, to secure the best talent for admission to medical colleges Thirdly, it is urged that the procedure evolved by the Selection Committee for interview, which we have already referred to, was in violation of the Rules It is also urged that there was no objective test laid down in the Rules for interview and the questions that were put were unrelated to rule 10 (*d*), which lays down certain criteria for the purpose. Lastly, it is urged that the selection was *mala fide* inasmuch as the two official members contrived to secure caste representation in the matter of admission.

The petitions have been opposed on behalf of State of Madras as also the civil appeal It has been urged that there is no substance in any of the contentions raised in these cases It is unnecessary to refer to the stand taken by the State of Madras in detail at this stage, for it will appear at appropriate places when we consider the various points raised in these cases

Before we consider the points raised in these cases, we may refer to a preliminary objction raised on behalf of the respondents It is urged that the selected candidates whose number is in the neighbourhood of 1,100 have not been made parties in these cases and therefore the cases should be rejected on that ground alone Learned Counsel for the petitioners/appellant, however, accepted that so far as the present selections are concerned, they would not press for quashing them, for in any case it would be too late for these petitioners/appellant to get admission in medical colleges this year. They therefore pray that the points raised may be decided for the future and the selection made this year may not be disturbed. On that basis it is urged on

behalf of the petitioners and the appellant that it would not be necessary to make the candidates selected for this year parties. In view of this statement at the Bar we propose to decide the points raised in these cases but shall not disturb the selections made this year.

The first challenge is to rule 5 on the ground that it violates Article 15 of the Constitution Article 15 forbids discrimination against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them At the same time Article 15(4) *inter alia* permits the State to make any special provision for the advancement of any socially and educationally backward classes of citizens The contention is that the list of socially and educationally backward classes for whom reservation is made under rule 5 is nothing but a list of certain castes. Therefore, reservation in favour of certain castes based only or caste considerations violates Article 15 (1), which prohibits discrimination on the ground of caste only. Now if the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of Article 15 (1). But it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of Article 15 (4). Reference in this connection may be made to the observations of this Court in *M R. Balaji* v. *State of Mysore*[1], to the effect that it was not irrelevant to consider the caste of a class of citizens in determining their social and educational backwardness. It was further observed that though the caste of a class of citizens may be relevant its importance should not be exaggerated; and if classification of backward classes of citizens was based solely on the caste of the citizen, it might be open to objection It is true that in the present cases the list of socially and educationally backward classes has been specified by caste. But that does not necessarily mean that caste was the sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward citizens. In its reply, the State of Madras has given the history as to how this list of backward classes was made, starting from the year 1906 and how the list has been kept upto date and necessary amendments made therein. It has also been stated that the main criterion for inclusion in the list was the social and educational backwardness of the caste based on occupations pursued by these castes Because the members of the caste as a whole were found to be socially and educationally backward, they were put in the list. The matter was finally examined after the Constitution came into force in the light of the provisions contained in Article 15 (4). As it was found that members of these castes as a whole were educationally and socially backward, the list which had been coming on from as far back as 1906 was finally adopted for purposes of Article 15 (4). In short the case of the State of Madras is that the castes included in the list are only a compendious indication of the class of people in those castes and these classes of people had been put in the list for the purpose of Article 15 (4) because they had been found to be socially and educationally backward.

This is the position as explained in the affidavit filed on behalf of the State of Madras. On the other hand the only thing stated in the petitions is that as the list is based on caste alone it is violative of Article 15 (1). In view however of the explanation given by the State of Madras, which was not been controverted by any rejoinder, it must be accepted that though the list shows certain castes, the members of those castes are really classes of educationally and socially backward citizens No attempt was made on behalf of the petitioners/appellant to show that any caste mentioned in this list was not educationally and socially backward. No such averment was made in the affidavit in support of their cases, nor was any attempt made to traverse the case put forward on behalf of the State of Madras by filing a rejoinder affidavit to show that even one of the castes included in the list was not educationally and socially backward In this state of the pleadings, we must come to the conclusion that though the list is prepared castewise, the castes included therein are as a whole

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1. (1963) 1 S.C.R (Supp) 439 at p. 459, 460 . A.I.R 1963 S.C. 649.

educationally and socially backward and therefore the list is not violative of Article 15. The challenge to rule 5 must therefore fail.

The next attack is on rule 8 which provides for districtwise distribution of seats according to population of the district. This is attacked first on the ground that it violates Article 15 (1) which lays down that there shall be no discrimination on the basis of place of birth and it is urged that the provision for "nativity claimed" in the form is really a camouflage for discriminating on the ground of place of birth. We have already referred to the provisions relating to nativity certificate We must say that these provisions are as complicated and confusing as possible and there may be some force in the contention raised that this has been done to get over the prohibition in Article 15 (1) with respect to discrimination on the basis of place of birth. What exactly "nativity" means is not clear from the rules , it may be the place from where the candidate passed his S.S L C Examination , it may be the place where his father was born or his mother was born ; it may be the place where his father has property or his mother has property, or it may be the place of permanent residence of the parents or guardian for the words "permanent residence" appear in the form of nativity certificate But the dictionary meaning of the word "nativity" is birth and when the Rules provide for nativity certificate they really mean the place of birth. However, it appears that the place of birth of the candidate is nowhere mentioned in the Rules Even though there may be some substance in the charge that all this complicated and confusing method has been provided in order to get over the prohibition in Article 15 (1) by a camouflage we cannot say that there is a clear violation of Article 15 (1) for the district which the candidate may claim does not depend upon the place of his birth. We cannot therefore strike down rule 8 on the ground that it discriminates on the basis of place of birth of the candidate concerned.

In the alternative it is urged that districtwise distribution violates Article 14 of the Constitution because it denies equality before the law or equal protection of the laws, inasmuch as such allocation of seats may result in candidates of inferior calibre being selected in one district while candidates of superior calibre cannot be selected in another district. It has not been denied on behalf of the State that such a thing cannot happen though there are no statistics available in this behalf because the mark-sheets were all destroyed after the interviews.

The question whether districtwise allocation is violative of Article 14 will depend on what is the object to be achieved in the matter of admission to medical colleges. Considering the fact that there is a larger number of candidates than seats available, selection has got to be made The object of selection can only be to secure the best possible material for admission to colleges subject to the provision for socially and educationally backward classes Further whether selection is from the socially and educationally backward classes or from the general pool, the object of selection must be to secure the best possible talent from the two sources If that is the object, it must necessarily follow that that object would be defeated if seats are allocated district by district It cannot be and has not been denied that the object of selection is to secure the best possible talent from the two sources so that the country may have the best possible doctors If that is the object, the argument on behalf of the petitioners/appellant is that that object cannot possibly be served by allocating seats districtwise It is true that Article 14 does not forbid classification, but the classification has to be justified on the basis of the nexus between the classification and the object to be achieved, even assuming that territorial classification may be a reasonable classification The fact however that the classification by itself is reasonable is not enough to support it unless there is nexus between the classification and the object to be achieved Therefore, as the object to be achieved in a case of the kind with which we are concerned is to get the best talent for admission to professional colleges, the allocation of seats districtwise has no reasonable relation with the object to be achieved If anything, such allocation will result in many cases in the object being destroyed, and if that is so, the classification, even if reasonable, would result in discrimination, inasmuch as better qualified candidates from one district may be reject-

ed while less qualified candidates from other districts may be admitted from either of the two sources.

Let us now look to the justification which has been put forward on behalf of the State of Madras in support of this districtwise allocation. It is said that there are better educational facilities in Madras City as compared to other districts of the State and therefore if districtwise selection is not made, candidates from Madras City would have an advantage and would secure many more seats than justified on the basis of proportion of the population of Madras city compared to the population of the State as a whole This i . our opinion is no justification for districtwise allocation which results in discrimination even assuming that candidates from Madras City will get a larger number of seats in proportion to the population of the State That would happen because a candidate from Madras City is better If the object is to attract the best talent, from the two sources, districtwise allocation in the circumstances would destroy that object Further even if we were to accept this contention that would only justify allocation of seats between the city of Madras on one side and the rest of the State on the other and not a districtwise allocation throughout But apart from this, we are of opinion that the object being what we have indicated, there is no reason why there should be discrimination which would go against the candidates from Madras City We may add that candidates who pass from Madras city need not all be residents of the city for it is common knowledge that schools and colleges in the capital city attract students from all over the State because of better educational facilities.

Another justification that has been attempted is that candidates coming from various districts would settle down in those districts and this medical help would be available in sufficient measure in all the districts Now this was not stated in the affidavit on behalf of the State of Madras. Besides there are no facts and figures to suggest that candidates from a particular district would by and large settle down in that district Further the various options in the matter of nativity certificate to which we have referred, show that candidates will have a number of districts to choose from depending upon where they think that their chances are best and therefore the argument that districtwise allocation is justifiable on this ground is in our opinion of no merit We are satisfied therefore that the State of Madras has made out no case for districtwise allocation of seats in medical colleges We are also satisfied that such allocation results in discrimination and there is no nexus between this territorial distribution and the object to be achieved, namely, admission of the best talent from the two sources already indicated. We are therefore of opinion that allocation of seats on districtwise basis is violative of Article 14 We may add that we do not mean to say that territorial classification is always bad under all circumstances But there is no doubt that districtwise classification which is being justified on a territorial basis in these cases is violative of Article 14, for no justification worth the name in support of the classification has been made out We therefore hold that rule 8 providing for districtwise allocation is bad, as it violates Article 14 and we hereby strike it down.

In view of our decision as to rule 8 and in view of the fact that there is no question of disturbing the selection made this year, we do not think it necessary to decide finally whether the procedure for selection followed in the present cases to which we have already referred is in accordance with the Rules or not All that we need say is that it certainly looks odd that the members of the selection committee should sit separately. But we do not propose to decide the point finally in the present cases.

We do not find any s ubstance in the argument that there is no test provided for marking Rule 10 (*d*) indicates what matters have to be taken into consideration for allotting marks provided under that rule We do not think that it is possible to provide any further guidance in the matter and the rest must be left to the Selection Committee It may be added that we are not prepared to accept that the Committee did not follow the criterion indicated in rule 10 (*d*) in allotting the marks provided in that rule.

This leaves the question of *mala fide* Only two points are urged in this connection The first is that the official members of the Selection Committees contrived to get caste representation in the matter of selection at the behest of the Government. There is in our opinion no proof of this and we are not prepared to accept that this was done. The second point in support of *mala fides* is that mark-sheets were destroyed after the selection was over It does look odd that mark-sheets were so destroyed and we should have thought that mark-sheets would be kept for some period at any rate after the selection was over But from this it is not possible to infer that the selection itself was *mala fide* Moreover the attack on the selection on the ground of *mala fides* will affect the current selection only and therefore in view of the stand taken at the Bar by the petitioners this ground does not now avail them The ground that the selection was *mala fide* must therefore fail

We now come to the civil appeal Learned Counsel for the appellant wished to raise an argument based on Article 21, which deals with protection of life and personal liberty. Apart from the question whether admission to professional colleges results in deprivation of life and liberty, we did not allow learned Counsel to develop this point because no such case was made out before the Division Bench of the High Court which heard the appeal We told learned Counsel that he could argue only those points which had been urged before the Division Bench The only point urged before the Division Bench was on the basis of a provision in the University Act as to eligibility and qualification of candidates for admission to medical colleges There is however no substance in the contention raised in this behalf, for the Rules as to eligibility and qualification as framed by the University have been followed So far as admission is concerned, it has to be made by those who are in control of the Colleges,—in this case the Government, because the medical colleges are Government colleges affiliated to the University In these circumstances, the Government was entitled to frame rules for admission to medical colleges controlled by it subject to the rules of the University as to eligibility and qualifications This was what was done in these cases and therefore the selection cannot be challenged on the ground that it was not in accordance with the University Act and the Rules framed thereunder.

We therefore partly allow the petitions and strike down rule 8 of the Rules for admission to medical colleges, which deals with districtwise allocation The appeal is also allowed to the same extent. We have already indicated that so far as the selection for the current year is concerned, it will stand, however, rule 8 will not be enforced when selection is made hereafter. The petitioners/appellant will get their costs, one set of hearing fee.

V.M K. ——— *Petitions and appeal partly allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT .—M. HIDAYATULLAH, *Chief Justice* R S BACHAWAT, C A VAIDIALINGAM, K S. HEGDE AND A. N GROVER, JJ

T. K Lakshmana Iyer and others . *Appellants**

v.

The State of Madras and others etc. *Respondents.*

Madras Hindu Religious Endowments Act (*II of* 1927), *as amended by Act V of* 1944 *and Act X of* 1946, *section* 44-*B*—*Object and applicability of*—*Resumption of lands under section* 44-*B* (2)—*Grant of permanent lease by inamdar*—*Whether lands can be resumed*—*Limitation for initiation of proceedings under section* 44-*B* (2).

Words and Phrases—"*Cowle.*"

There is a well-recognised distinction between the grant of the land burdened with a condition of service and the grant of land as remuneration for an office. Section 44-B does not apply to a personal inam burdened with a condition of

* C.As. Nos. 484 and 485 of 1965. 26th March, 1968.

service It applies to an inam granted to an office-holder as remuneration for his service connected with a math or temple as also to an inam granted to the institution directly The inams in the present case were not personal inams They were inams granted to office-holders as remuneration for services to be rendered by them and were within the purview of section 44-B (*held*, further, that the inam comprised both the warams)

Sub-section (2) is not dependent upon sub-section (1) and allows resumption even in cases where there has been no alienation of the inam There can be no doubt that section 44-B (2) (*a*) (*i*) allows a resumption of the inam where there has been an alienation of the inam either before or after 1934 Even apart from section 44-B, any inam whatever its nature could be resumed for failure to perform the conditions of the grant The object of section 44-B was to define and enlarge the grounds on which the inams could be resumed and to devise a proper procedure for resumption On general grounds of public policy, the Legislature has declared that the inam may be resumed on any of the three grounds mentioned therein The first ground is that the holder of the inam has made an alienation The words "has made" in sub-section (2) (*a*) (*ii*) takes in all alienations past and future and not only future alienations or alienations made after the section came into force If there has been any alienation at any time the first ground exists and the inam may be resumed under section 44-B. The words "has failed" in Sub-section (2) (*a*) (*ii*) and the words "has ceased" and "has become" in sub-section (2) (*a*) (*iii*) similarly authorise resumption of the inam if the other grounds exist though they may have arisen earlier. Section 44-B (2) is in its direct operation prospective as it authorises only future resumption after it came into force It is not properly called retrospective "because a part of the requisities for its action is drawn from a time antecedent to its passing" The inams in the present case are resumable under section 44-B (2) (*a*) (*i*) though the alienations were made before 1934

Section 44-B (2) (*a*) (*i*) is attracted if the holder of the inam has made an exchange gift, sale or mortgage of the inam or has granted a lease of it for a term exceeding five years All leases do not come within the purview of section 44-B (2) (*a*) (*i*). The lease must be for a term exceeding five years A lease from year to year is not a lease for a term exceeding five years howsoever long the lessee might have continued in possession of the demised lands (held on facts, that the plaintiffs ought not to be allowed to raise at this late stage the novel contention that the lease was from year to year) This contention is contrary to the case made by them in the plaint Moreover, the materials on the record do not support the contention The plaintiffs and their predecessor-in-title were in continuous possession of the lands for over 80 years under the cowle lease. The original cowle is not forthcoming The plaintiffs claimed to be permanent alienees of the lands, held that the cowle granted a permanent lease and the inams were resumable under section 44-B 2 (*a*) (*i*)

There is no period of limitation prescribed for the initiation of proceedings under section 44-B (2) The section gave a new statutory right of resumption of the inams On a resumption of the inams, the title, if any, of all persons claiming through the inamdars to any subordinate interest in the inams stood determined (on facts, held, that no prescriptive title to the kudiwaram rights was acquired either against the inamdars or against the Government The Government could, therefore, resume the inam lands under section 44-B (2) and dispossess the inamdars and the plaintiffs claiming under them)

The word "cowle" means a lease

Appeals by Special Leave from the Judgment and Decree, dated the 14th December, 1959 of the Madras High Court in Appeals Nos. 808 and 746 of 1954.

S T. Desai, Senior Advocate (*P.C. Bhartari*, Advocate, and *J.B. Dadachanji*, Advocate of *M/s J B Dadachanji & Co*, with him), for Appellants (In both the Appeals).

A V Rangam, Advocate, for Respondent No. 1 (In C.A. No. 484 of 1965)

R Gopalakrishnan, Advocate, for Respondents Nos 1 to 3 (In C.A. No 485 of 1965)

B. Dutta, Advocate, for Respondents Nos. 4, 9 and 11 (In C A. No. 484 of 1965) and Respondents Nos 13 to 17 and 20 (In C A No 485 of 1965)

The Judgment of the Court was delivered by

Bachawat, J—In the village of Thenkarai in the Madurai District there is an ancient temple of Sri Thirumoolanathaswami. Inams were granted by Hindu kings for performance of services of watchman, palanquin-bearer, background music player, dancing girl, musical instrument player, mason, blacksmith-carpenter, potter, washerman connected with the temple The inams were confirmed by the British Government For over 80 years, the inams were in the enjoyment of alienees from inamdars By an order passed on 10th April, 1947 under section 44-B of the Madras Hindu Religious Endowments Act, the Revenue Divisional Officer, Usilampatti, resumed the inam lands and regranted them to the temple. On 17th October, 1947, his order was confirmed on appeal by the District Collector. The Revenue Divisional Officer and the District Collector held that the inams comprised both melwaram and kudiwaram rights in the land The orders were passed on notice to the alienees The alienees instituted a suit in the Court of the Subordinate Judge, Madurai, under the proviso to section 44-B (2) (*d*) (*ii*) asking for a decree declaring that the inam grants consisted of the melwaram only The suit was with drawn to the Court of the District Judge, Madurai, and registered as O S No. 3 of 1954 They instituted another suit in the Court of the Subordinate Judge, Madurai, asking for a decree declaring that the order of the Collector dated 17th October, 1947 was a nullity This suit was transferred to the Court of the District Judge and registered as O S No 4 of 1954 The District Judge dismissed O.S. No. 3 of 1954 He decreed O S No 4 of 1954 and declared that the order resuming the inam lands was illegal and a nullity The plaintiffs filed an appeal registered as A S. No 746 of 1954 in the High Court of Madras from the decree in O S No. 3 of 1954. The High Court dismissed the appeal The State of Madras filed an appeal registered as A S No 808 of 1954 from the decree in O S. No. 4 of 1954 The High Court allowed the appeal and dismissed the suit with respect to all the inams except the Dasi inam Regarding the Dasi inam, the High Court dismissed the appeal as the inam was enfranchised and could not be resumed It is from the decree of the High Court dismissing the suits in respect of the other inams that the plaintiffs have filed these appeals after obtaining Special Leave

The two Courts concurrently held that the inams comprised both the kudiwaram and the melwaram The District Judge held that the right to resume an inam could not be extinguished by adverse possession, and that, in any event, the claim of adverse possession was not established The High Court held that assuming the right of resumption could be so extinguished, it was not established that the plaintiffs and their predecessors-in-title were in possession of the inam lands adversely to the inamdars or the Government. The District Judge held that the inams were personal inams burdened with services and the order of resumption was therefore illegal and a nullity The High Court reversed this finding and held that the inams were for performance of services connected with the temple and were resumable under section 44-B The District Judge held that section 44-B was retrospective in operation On this last point, the High Court did not express any opinion

It may be noted that O S Nos 3 and 4 of 1954 were tried along with O S Nos 1 and 2 of 1954 and disposed of by the District Judge by a common judgment. O S Nos 1 and 2 of 1954 related to inams granted for performance of puja in

another temple. From the decrees passed in O S Nos 1 and 2 of 1954, there were appeals to the High Court and subsequently appeals to this Court The judgment in those appeals is reported in *Roman Catholic Mission* v *State of Madras*[1] One of the points in all the four suits was whether section 44-B was *ultra vires* the powers of the Legislature This Court held that the Provincial Legislature was competent to enact section 44-B and the amendment to it

On behalf of the appellants, Mr S T Desai submitted that (1) the inam grants did not comprise the kudiwaram , (2) the inams were personal inams burdened with services and were not resumable under section 44-B , (3) section 44-B (2) was not retrospective in operation and did not authorise resumption of the inams on the ground of any alienation thereof made before 1934 , (4) there was no alienation of the inams as contemplated by section 44-B (2) (*a*) (*i*) and (5) the right of resumption of the inam lands was extinguished by adverse possession of the lands by the alienees for over 60 years

The Madras Hindu Religious Endowments Act, 1926 (II of 1927) was passed on 19th January, 1927 Section 44-B was inserted in the present Act by Madras Act XI of 1934 and was later amended by Madras Act V of 1944 and Madras Act X of 1946 This section corresponds to section 35 of the Madras Hindu Religious and Charitable Endowments Act (XIX of 1951) which repealed Act II of 1927 The material provisions of section 44-B are in these terms :

"44-B. (1) Any exchange, gift, sale or mortgage, and any lease for a term exceeding five years, of the whole or any portion of any inam granted for the support or maintenance of a math or temple or for the performance of a charity or service connected therewith and made, confirmed or recognised by the British Government, shall be null and void

Explanation—Nothing contained in this sub-section shall affect or derogate from the rights and obligations of the landholder and tenant in respect of any land as defined in the Madras Estates Land Act, 1908

(2) (*a*) The Collector may, on his own motion, or on the application of the trustee of the math or temple or of the Assistant Commissioner or of the Board or of any person having interest in the math or temple who has obtained the consent of such trustee, Assistant Commissioner or Board, by order, resume the whole or any part of any such inam, on one or more of the following grounds, namely —

(*i*) that the holder of such inam or part has made an exchange, gift, sale or mortgage of the same or any portion thereof or has granted a lease of the same or any portion thereof for a term exceeding five years, or

(ii) that the holder of such inam or part has failed to perform or make the necessary arrangements for performing, in accordance with the custom or usage of such math or temple, the charity or service for performing which the inam had been made, confirmed or recognised by the British Government, or any part of the said charity or service, as the case may be, or

(iii) that the math or temple has ceased to exist or the charity or service in question has in any way become impossible of performance.

When passing an order under this clause, the Collector shall determine whether such inam or the inam comprising such part, as the case may be, is a grant of both the melwaram and the kudiwaram or only of the melwaram.

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(*f*) Where any inam or part of an inam is resumed under this section, the Collector or the District Collector, as the case may be, shall, by order, re-grant such inam or part—

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1 (1967) 1 S C J 605 (1967) 1 An W R (S C.) 119 (1967) 1 M L J (S C) 119 (1966) 3 S.C.R 283.

(i) as an endowment to the math or temple concerned, or

(ii) in case of resumption on the ground that the math or temple has ceased to exist or that the charity or service in question has in any way become impossible of performance, as an endowment to the Board, for appropriation to such religious, educational or charitable purposes not inconsistent with the objects of such math or temple, as the Board may direct"

The inam title deeds, the entries in the Inam Fair Register prepared at the time of the confirmation of the inams by the Inams Commissioner in 1863 and the contemporaneous statement made by the inamdars are of the same pattern in respect of all the inams. It is sufficient to refer to Exhibits B-4, B-5 and B-6 relating to the inam for the service of *Sree Padam Thangi* (palanquin-bearers) The statement, Exhibit B-4, shows that in Fasli 1272 corresponding to 1862-63, Veerabadra Mudali, Periasami Mudali, Andiappa Mudali were in enjoyment of the inam and rendering the service under the direction of the paisaldars or the trustees of the temple. They made the following statement "For taking the deities in procession round the village during the festival in the temple of Tirumulanathaswami and Akilandeswari Amman in the village of Kovil Thenkarai the aforesaid land has been granted as inam The paisaldars appointed our ancestors and got service from them The aforesaid manyam was in their enjoyment. Afterwards the manyam was divided and during Fasli 36, it was registered in the name of myself individual No 1 and in the names of the fathers of individuals Nos. 2 and 3 They were rendering the service and enjoying manyam and in the same manner we have been rendering the aforesaid service and enjoying the manyam" The entries in the Inam Fair Register, Exhibit B-5 show that the inam belonged to the category of Devadayam and was for the service of *Sree Padam Thangi* which was being then rendered, that the original grant was made to the temple before Fasli 1212 corresponding to 1802-3, and that in 1863 the inam was being enjoyed by Veerabadra Mudali, Periasami Mudali and Andiappa Mudali. The title deed acknowledged their title to Devadayam or pagoda service inam to 11-47 acres of land held for the service of *Sree Padam Thangi* and confirmed the inam to them and their successor's tax-free to be held without interference so long as the conditions of the grant were duly fulfilled.

These documents show that the lands were being enjoyed by the inamdars and were granted as inams. The amount of the assessment or melwaram was very low and could not be an adequate remuneration for the services to be rendered The plaintiffs claimed title to the lands under a grant from the inamdars on the footing that the inamdars were entitled to the kudiwaram and the melwaram. The conclusion is irresistible that the inam comprised both the warams.

The inams were originally granted to the temple for the performance of services connected therewith. The trustees of the temple appointed persons to perform those services and placed the inams in their possession to be enjoyed by them as remuneration for the services to be rendered by them The Inam Commission confirmed the grants of the inams in favour of the hereditary office-holders then rendering the services. Where there were several holders of the office, the inams were shown to be in their enjoyment in equal shares It is quite clear that the inams were granted to the holders of hereditary offices as remuneration for services to be rendered by them in connection with the temple.

There is a well-recognised distinction between the grant of the land burdened with a condition of service and the grant of land as remuneration for an office, see *Forbes* v *Meer Mahomed Tuquee*[1] Section 44-B does not apply to a personal inam burdened with a condition of service. See *P V Bheemsena Rao* v *Sirigiri Pedda Yella Reddi*.[2] It applies to an inam granted to an office-holder as remuneration for his services connected with a math or temple as also to an inam granted to the institution

1 (1870) 13 M I A. 438, 464
2 (1961) 2 S C J 671 (1961) 2 M L J (S C) 190 (1961) 2 An W R (S C) 190 (1962) 1 S C R 339

directly. The inams in the present case were not personal inams. They were inams granted to office-holders as remuneration for services to be rendered by them and were within the purview of section 44-B.

The next question is whether section 44-B allows resumption of an inam falling within the purview of the section where the inam was alienated before the section came into force in 1934 Sub-section (1) of section 44-B renders null and void certain alienations of the inam Sub-section (2) authorises resumption of the inam on certain grounds Sub-section (2) is not dependent upon sub-section (1) and allows resumption even in cases where there has been no alienation of the inam In the present case, we are not concerned with the retrospective operation of sub-section (1) of section 44-B, and we express no opinion on it But there can be no doubt that section 44-B (2) (*a*) (i) allows a resumption of the inam where there has been an alienation of the inam either before or after 1934 Even apart from section 44-B, any inam whatever its nature could be resumed for failure to perform the conditions of the grant Subject to certain restrictions and safeguards, paragraph 2 of the Board's Standing Order No 54 permitted resumption of religious and charitable inams on the ground that the land was alienated or otherwise lost to the institution or service to which it once belonged or on the ground that the terms of the grant were not observed. The object of section 44-B was to define and enlarge the grounds on which the inams could be resumed and to devise a proper procedure for resumption On general grounds of public policy, the Legislature has declared that the inam may be resumed on any of the three grounds mentioned therein The first ground is that the holder of the inam has made an alienation The words "has made" in sub-section (2) (*a*) (i) takes in all alienations past and future and not only future alienations or alienations made after the section came into force If there has been any alienation at any time the first ground exists and the inam may be resumed under section 44-B The words "has failed" in sub-section (2) (*a*) (ii) and the words "has ceased" and "has become" in sub-section (2) (*a*) (iii) similarly authorise resumption of the inam if the other grounds exist though they may have arisen earlier Section 44-B (2) is in its direct operation prospective as it authorises only future resumption after it came into force It is not properly called retrospective "because a part of the requisites for its action is drawn from a time antecedent to its passing" See *Maxwell on Interpretation of Statutes*, 11th Edn., p 211. The inams in the present case are resumable under section 44-B (2) (*a*) (i) though the alienations were made before 1934.

Section 44-B (2) (*a*) (i) is attracted if the holder of the inam has made an exchange, gift, sale or mortgage of the inam or has granted a lease of it for a term exceeding five years In the plaint in suit O S No 4 of 1954 the plaintiffs claimed that one Kunjunna Ayyar, their predecessor-in-title purchased the lands from the inamdars before 1861 The plaintiffs failed to prove that the inamdars sold the lands The only direct evidence as to how Kunjanna Ayyar came into possession of the suit lands is furnished by Exhibit A-2, a statement made by the inam-holders to the Madurai District Collector on 14th August, 1868 It shows that Kunjanna Ayyar had taken the lands on cowle from the inamdars The word "cowle" means a lease In *Wislon's Glossary* it is stated that the word ordinarily denotes a lease and not a mortgage Before the District Collector the plaintiffs admitted that they were holding under a cowle lease The District Collector held that the alienation was within the purview of section 44-B The High Court also held that the plaintiffs and their predecessor-in-title were in enjoyment of the lands under the lease At no stage of the litigation either before the revenue authorities or in the plaint or before the District Judge or in the High Court did the plaintiffs contend that the alienation in their favour was not within the purview of section 44-B (2) (*a*) (i) As a matter of fact, the case made in the plaint was that their predecessor-in-title had purchased the land from the inamdars Such an alienation is clearly within the purview of section 44-B (2) (*a*) (i) For the first time in this Court it is contended that the alienation was by way of a lease from year to year. It may be conceded that all leases do not come within the purview of section 44-B (2) (*a*) (i). The lease must be for a term exceeding five years A lease from year to year is not

a lease for a term exceeding five years howsoever long the lessee might have continued in possession of the demised lands. But we think that the plaintiffs ought not to be allowed to raise at this late stage the novel contention that the lease was from year to year. This contention is contrary to the case made by them in the plaint Moreover, the materials on the record do not support the contention. The plaintiffs and their predecessor-in-title were in continuous possession of the lands for over 80 years under the cowle lease The original cowle is not forthcoming. The plaintiffs claimed to be permanent alienees of the lands In all these circumstances, we are inclined to presume that the cowle granted a permanent lease and the inams were resumable under section 44-B (2) (*a*) (i).

There is no period of limitation prescribed for the initiation of proceedings under section 44-B (2) The section gave a new statutory right of resumption of the inams. On a resumption of the inams, the title, if any, of all persons claiming through the inamdars to any subordinate interest in the inams stood determined Kunjanna Ayyar and his successors-in-title were lessees of the inam lands under the inamdars. During the continuance of the tenancy, their possession was not adverse to the inamdars *A fortiorari*, their possession was not adverse to the Government under whom the inamdars held the inam lands. They did not acquire any prescriptive title to the kudiwaram rights either against the inamdars or against Government The Government could, therefore, resume the inam lands under section 44-B (2) and dispossess the inamdars and the plaintiffs claiming as lessees under them The question whether an alienee from the inamdar can acquire prescriptive title to the kudiwaram rights in the inam lands against the Government and thereby defeat the latter's right to resume the inam does not, therefore, arise for decision, and we express no opinion on it. It may be noted that in ***Roman Catholic Mission*** v. ***State of Madras***[1] this Court held that there is no limitation barring imposition of assessment on the land after resuming the melwaram

It follows that both the kudiwaram and melwaram rights were rightly resumed under section 44-B (2) (*a*) (i)

In the result, the appeals are dismissed. In all the circumstances of the case there will be no order as to costs

S.V.J. *Appeals dismissed.*

1. (1967) 1 S C J 605 (1967) 1 An W R (S.C.) 119 . (1967) 1 M L J (S C) 119 : (1966) 3 S C.R 283, 299 : A I.R. 1966 S.C 1457.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—G. K. MITTER AND K. S. HEGDE, JJ.

P.D. Sharma .. *Appellant*

v.

The State Bank of India .. *Respondent.*

Constitution of India (1950), *Articles* 226, 132 *and* 133 (1) (*c*)—*Special Leave application pending application under Articles* 132 *and* 133—*Appellant failing to mention the fact, but mentioning only the fact of dismissal of his application under Article* 226—*No deliberate suppression of fact*—*Special Leave, if could be revoked.*

Constitution of India (1950), *Articles* 226 *and* 136—*Scope of appeal under Article* 136 *wider than petition under Article* 226—*Appeal under Article* 136, *if can succeed even if no case is made out to issue a writ of* certiorari.

Industrial Disputes Act (XIV of 1947), *section* 33 (2) *and* (3)—*Interpretation and scope of the sub-sections*—*Right of the employer to punish his employee for misconduct under common law*—*Limitation on the employer's right during the pendency of the industrial dispute*—*Decision on industrial dispute*—*Effect on application for permission to dismiss the employee.*

The High Court summarily rejected the appellant's application under Article 226 of the Constitution. The Appellant approached the Supreme Court for Special Leave when his application under Articles 132 and 133 (1) (*c*) was pending in the High Court. Though in his Special Leave application the appellant mentioned the fact that his application under Article 226 had been dismissed by the High Court, he failed to mention the fact that his application for a certificate under Articles 132 and 133 was pending before the High Court. Since, the omission to mention that his application for a certificate under Articles 132 and 133 was pending, was not a deliberate suppression of the fact, there is no reason to revoke the Special Leave granted.

The scope of an appeal under Article 136 is much wider than a petition under Article 226. In an appeal under Article 136, the Court can go into the question of fact as well as law whereas the High Court in the writ petition could have only to consider the question which would have been strictly relevant in an application for a writ of *certiorari*. From the Order of the High Court it is not possible to find out the reason or reasons that persuaded it to reject the appellant's petition. An appeal under Article 136 against the Order can succeed even if no case is made out to issue a writ of *certiorari*.

On a comparison of sub-section (2) and (3) of sections 33 of the Industrial Disputes Act, 1947, it would be seen that the scope of the two provisions are wholly different. The purpose of those two sections are also wholly different. This will be clear from the history of section 33 since its incorporation of the Act of 1947. By enacting section 33 the Parliament wanted to ensure a fair and satisfactory enquiry of an industrial dispute undisturbed by any action on the part of the employer which could create fresh cause for disharmony between him and his employee. The object of section 33 is that during the pendency of an industrial dispute *status quo* should be maintained and no further element of discard should be introduced. But, then distinction was made between matters connected with the industrial dispute and those unconnected with it. While construing the scope of sub-section (3) of section 33 it is to be borne in mind that under the common law the employer has a right to punish his employee for misconduct. Once the industrial dispute was decided the ban placed on the common law, statutory or contractual rights of the respondents (employer) stood removed and it was free to exercise those rights. Thereafter there was no need to take anybody's permission to exercise its rights. In other words, the limitation placed on the respondent's rights by sub-section (3)

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of section 33 disappeared the moment the industrial dispute was decided Therefore, the tribunal had no competence to consider the application made by the respondent after the industrial dispute was decided

Appeal by Special Leave from the Order, dated the 10th February, 1965 of the Labour Court, Lucknow (Central) in Miscellaneous Case No. 22 of 1963.

Petition for Special Leave to Appeal (Civil) No. 1385 of 1967 and Civil Miscellaneous Petition No 3144 of 1967

A K Sen, Senior Advocate (*Dr Anand Prakash*, Advocate, with him), for Appellant

Niren De, Solicitor-General of India and *S. V. Gupte*, Senior Advocate (*K. Baldev Mehta*, Advocate and *H L Anand*, Advocate of *Anand, Das Gupta* and *Sagar* with them), for Respondent

The Judgment of the Court was delivered by

Hegde, J—In the aforementioned appeal by Special Leave, the point for consideration is whether the Labour Court, Lucknow, was right in its conclusion that it was not competent to deal with Misc. Case No 22 of 1963 on its file, an application under section 33 (3) of the Industrial Disputes Act, 1947

In 1961, the appellant was a clerk working in the Dehradun branch of the State Bank of India, the respondent herein In connection with certain alleged misconduct the respondent held a departmental enquiry against him ; came to the conclusion that he was guilty of the charge levelled against him and for the said offence it proposed to dismiss him from its service But as at that time an industrial dispute between the respondent and its workmen was pending before the National Industrial Tribunal in Ref No 1 of 1960 (which will hereinafter be referred to as the industrial dispute), and the appellant being one of the office bearers of a recognized trade union connected with the respondent and consequently a 'protected workman', it applied on 27th April, 1962 under section 33 (3) to the National Industrial Tribunal for permission to discharge him from service On the authority of an order made by the Central Government on 23rd December, 1960 under sub-section (2) of section 33-B, the National Industrial Tribunal, Bombay, transferred the said application to the Labour Court, Delhi The National Industrial Tribunal, Bombay, made its award in the aforementioned Reference on 7th June, 1962 The same was published in the official gazette on 13th June, 1962 and it came into force on 31st July, 1962 Thereafter on 23rd February, 1963 the Government of India transferred the respondent's application under section 33 (3) pending before the Labour Court, Delhi, to the Labour Court, Lucknow That Court dropped the said proceedings as per its order dated 10th February, 1965 holding that in view of the award in the Reference in question it had no competence to deal with that application This order of the Labour Court was challenged by the appellant in Civil Misc Writ Petition No 619 of 1965 on the file of the Allahabad High Court That petition was summarily dismissed. Thereafter he applied to that Court for a certificate under Articles 132 (1) and 133 (1) (C) of the Constitution During the pendency of that application, he moved this Court on 17th July, 1965 for Special Leave under Article 136 of the Constitution to appeal against the order of the Tribunal. Special Leave was granted by this Court on 8th September, 1965. The application for certificate made before the Allahabad High Court was rejected by that Court by its order, dated 13th Sepetember, 1965 No application for Special Leave under Article 136 was filed against that order

When this appeal came up for hearing on a previous occasion, learned Counsel for the respondent urged that the Special Leave granted should be revoked as the appellant had not appealed against the order made by the Allahabad High Court in his writ petition Thereafter, the appellant moved this Court for Special Leave against the order of the Allahabad High Court rejecting his writ petition He also filed an application for condonation of the delay in submitting that Special Leave application

We are not satisfied that there is any force in the preliminary objection taken by the learned Solicitor-General on behalf of the respondent This case does not fall within the rule laid down by this Court in *Daryao and others* v *State of U P and others*[1]. As seen earlier, the High Court summarily dismissed the writ petition filed by the appellant. The order dismissing the writ petition was not a speaking order. Hence no question of *res judicata* arises The learned Solicitor-General did not try to bring the present case within the rule laid down in *Daryao's case* [1] His contention was that the order of the High Court not having been appealed against the same has become final and therefore it would be inappropriate for this Court to grant the relief prayed for by the appellant According to him, if the present appeal is allowed there will be two conflicting final orders We are unable to accept this contention as correct. The scope of an appeal under Article 136 is much wider than a petition under Article 226 In an appeal under Article 136 this Court can go into questions of facts as well by law whereas the High Court in the writ petition could have only considered questions which would have been strictly relevant in an application for a writ of *certiorari* From the order of the High Court it is not possible to find out the reason or reasons that persuaded it to reject the appellant's petition An appeal under Article 136 against an order can succeed even if no case is made out to issue a writ of *certiorari*

The decision of this Court in *Management of Hindustan Commercial Bank Ltd., Kanpur* v *Bhagwan Dass*[2], to which reference was made by the learned Solicitor-General does not bear on the question under consideration There the appellant had applied to the High Court for the issue of a certificate under Article 132 against its order but without pursuing that application he applied for and obtained from this Court Special Leave to appeal against the very same order and that without obtaining exemption from compliance with rule 2 of Order 13 of the rules of this Court. It was under those circumstances this Court held that Special Leave granted should be revoked.

The learned Solicitor-General in support of his preliminary objection placed a great deal of reliance on the decision of this Court in *Chandi Prasad Chokhani* v *State of Bihar*[3]. That was a case under the Bihar Sales Tax Act The appellant's claim of certain deductions had been disallowed by the department He went up in revision to the Board of Revenue. The Board of Revenue dismissed his revision Petition. Thereafter under section 25 (1) of the Bihar Sales Tax Act, he applied to the Board of Revenue by means of three different applications to state a case to the High Court of Patna in each of those petitions on questions of law formulated by him in his applications. But those applications were rejected The appellant then moved the High Court to call upon the Board to submit to it for its opinions the questions of law set out by him in his applications. The High Court dismissed his applications in respect of the first two periods of assessment by its order dated 17th November, 1954 it directed the Board to state a case in regard to the third period on one of the questions of law mentioned in the petition which alone in its opinion arose for consideration By its judgment dated, 21st January, 1957 the High Court answered that question against the appellant. On 17th February, 1955 the appellant made applications to this Court for Special Leave to appeal against the order of the Board of Revenue referred to earlier. The leave prayed for was granted. When the appeals came up for hearing, objection was raised as to their maintainability This Court held that though the words of Article 136 are wide this Court has uniformly held as a rule of practice that there must be exceptional and special circumstances to justify the exercise of the discretion under that article In the circumstances of that case the Court opined that the appellant was not entitled to obtin Special Leave against the orders of the Board of Revenue and thus bypass the orders of the High Court. In the course of the judgment this Court observed :

1. (1962) 1 S C J 702 (1962) 2 An W R (S C.) 16 : (1962) 2 M L J (S C) 16 (1962) 1 S.C.R. 574.
2. A.I.R. 1965 S.C. 1142.
3. (1961) 43 I T R 498 (1961) 12 S T C 506 (1962) 1 S C J. 138 (1962) 2 S.C.R. 276.

"The question before us is not whether we have the power, undoubtedly, we have the power, but the question is whether in the circumstances under present consideration, it is a proper exercise of discretion to allow the appellant to have resort to the power of this Court under Article 136 That question must be decided on the facts of each case, having regard to the practice of this Court and the limitations which this Court itself has laid down with regard to the exercise of its discretion under Article 136".

The reasons that persuaded this Court to revoke the Special Leave granted in those appeals are not available in this case.

This takes us to the question whether a case is made out to revoke the Special Leave granted We shall presently see that an important question of law arises for decision in this case. The High Court summarily rejected the appellant's application under Article 226 At the time the appellant approached this Court for Special Leave, his application under Articles 132 and 133 (1) (*c*) was pending in the High Court Though in his Special Leave appliction the appellant mentioned the fact that his application under Article 226 had been dismissed by the High Court, he failed to mention the fact that his application for a certificate under Articles 132 and 133 was pending before the High Court We were assured by Mr A K Sen, learned Counsel for the appellant that this omission was due to an erroneous impression of the law on the part of the Advocate on record and there was no intention to keep back that fact from this Court. As seen earlier the fact that the appellant's application under Article 226 had been dismissed was mentioned in the Special Leave application. Hence the omission in question cannot be considered as a deliberate suppression of a fact Under these circusmtances, we do not think that a case is made out to revoke the Special Leave granted.

We now come to the merits of the appeal. As seen earlier the tribunal had concluded that it had no competence to pass orders on the application made by the respondent under section 33 (3) as the industrial disputes had come to an end because of the award made by the National Tribunal According to Mr Sen the tribunal erred in taking that view He urged that once an application under section 33 (3) is validly made, the tribunal must decide whether the permission sought for should be granted or refused even though the industrial dispute had been decided during the pendency of that application His contention was that if an application under sub-sections (1), (2) or (3) of section 33 is made during the pendency of an industrial dispute, the tribunal which considers that application has to make an order one way or the other In support of this contention he placed strong reliance on the decision of this Court in *Tata Iron and Steel Co Ltd* v. *S N Modak*[1] That was a case arising under section 33 (2) (*b*) The question that arose for decision therein was whether a proceeding validly commenceed under that provision would automatically come to an end merely because the industrial dispute had in the meanwhile been finally determined This Court upheld the view taken by the tribunal that such an application would not automatically come to an end It was held therein that an application under section 33 (2) (*b*) is an independent proceeding and not an interlocutory proceeding, it is a proceeding between an employer and his employee who was no doubt concerned with the industrial dispute along with the other employees; but it is nevertheless a proceeding between two parties in respect of a matter not covered by that dispute It was further laid down therein that the order for the approval of which the application had been made would remain inchoate until the tribunal accords its approval, the said order cannot effectively terminate the relationship of the employer and the employee until an approval for that order is obtained from the tribunal. If the approval is not accorded, the employer would be bound to treat the workman as his employee and pay him full wages for the period even though the employer may subsequently proceed to terminate the employee's service. In that case this Court confined its attention to the scope of section 33 (2) (*b*). It did not address itself to section 33 (3). Hence, Mr. Sen is not right in his contention that the rule laid down in that decision governs the controversy before us.

1. (1965) 2 S.C J. 808: (1965) 3 S.C.R. 411.

Alternatively, Mr. Sen contended that the ratio of that decision at any rate would support his contention. To find out whether the ratio of that decision has any bearing on the question that is before us, we have to examine sub-sections (2) and (3) of section 33. They read:

"(2) During the pendency of any such proceeding in respect of any industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute, or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman—(*a*) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or (*b*) for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:

Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(3) Notwithstanding anything contained in sub-section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute—(*a*) by altering to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or (*b*) by discharging or punishing, whether by dismissal or otherwise, such protected workman,

save with the express permission in writing of the authority before which the proceeding is pending.

Explanation.—For the purposes of this sub-section, a 'protected workman' in relation to an establishment, means a workman who, being an officer of a registered trade union connected with the establishment is recognised as such in accordance with rules made in this behalf."

One common condition precedent for an application to be made under both those provisions is the pendency of any conciliation proceedings before a conciliation officer or a board or any proceeding before an arbitrator or a labour Court or a tribunal or National Tribunal in respect of an industrial dispute. That apart the two provisions deal with different situations. Sub-section (2) of section 33 concerns itself with actions that may be taken by an employer against his employees in respect of matters not connected with the industrial dispute. In those cases though the employer can take any of the actions mentioned in that provision in accordance with the standing orders or where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workmen, on his own authority, he must, in the case of discharging or punishing whether by dismissal or otherwise, a workman, pay him wages for one month and must also make an application to the authority before which the industrial dispute is pending for approval of the action taken by him. Sub-section (3) of section 33 deals with 'protected workman' which expression in relation to an establishment means a workman who being an officer of a registered trade union connected with the establishment, is recognized as such in accordance with the rules made in that behalf. If the employer wants to take any action prejudicial to a protected workman concerned in an industrial dispute pending before one of the authorities mentioned earlier he can do so only with the "express permission in writing of the authority before which the proceeding is pending." On a comparison of sub-sections (2) and (3) of section 33 it will be seen that the scope of the two provisions are wholly different. Taking the case of a worker's discharge or punishment by dismissal or otherwise in the former the previous permission of the authority before which the industrial dispute is pending is necesssary but under the latter only a subsequent approval from a competent authority is needed. Though the application under that provision

should be made to the authority before which the industrial dispute is pending the approval to be obtained need not be from that authority. Once approval is given it goes back to the date on which the order in question was made. If the approval asked for is not accorded then the action taken by the employer becomes *ab initio* void and the employee will continue, in service and his conditions of service will also continue without any break as if the order in question had not been made at all. Hence we are unable to accept the contention of Mr. Sen that the decision of this Court in *Tata Iron and Steel Company's case*[1] has any bearing on the question to be decided in this case.

The purpose of those two sub-sections are wholly different. This will be further clear if we refer to the history of section 33. That section, since its incorporation in the Act in 1947, has undergone several legislative changes.

As it stood originally it read:

> " No employer shall during the pendency of any conciliation proceeding or proceedings before a tribunal in respect of any industrial dispute, alter to the prejudice of the workmen concerned in such dispute the conditions of service applicable to them immediately before the commencement of such proceedings, nor save with the express permission in writing of the conciliation officer, board or tribunal, as the case may be, shall he during the pendency of such proceedings, discharge, dismiss, or otherwise punish any such workmen, except for misconduct not connected with the dispute."

The section was amended by Act XLVIII of 1950. The amended section read:

> " During the pendency of any conciliation proceedings or proceedings before a tribunal in respect of any industrial dispute, no employer shall (*a*) alter to the prejudice of the workmen concerned in such dispute the conditions of service applicable to them immediately before the commencement of such proceedings; (*b*) discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute;
>
> save with the express permission in writing of the conciliation officer, board or tribunal, as the case may be."

The amended section dropped the exception made in respect of misconduct not connected with the dispute. This change in the law prevented the employers from discharging or punishing their employees even in respect of a misconduct not connected with the industrial dispute. That was a serious inroad into the disciplinary jurisdiction of the employer. It is possibly with a view to avoid unnecessary interference with the rights of the employers the section was amended by Act XXXVI of 1956.

In *Strawboard Manufacturing Co.* v. *Gobind*[2], this Court observed :

> " The plain object of the section was to maintain the *status quo* as far as possible during the pendency of any industrial dispute before a tribunal. But it seems to have been felt that section 33, as it stood before the amendment of 1956, was too stringent for it completely took away the right of the employer to make any alteration in the conditions of service or to make any order of discharge or dismissal without making any distinction as to whether such alteration or such an order of discharge or dismissal was in any manner connected with the dispute pending before an industrial authority. It seems to have been felt therefore that the stringency of the provision should be softened and the employer should be permitted to make changes in conditions of service etc. which were not connected with the dispute pending before an industrial tribunal. For the same reason it was felt that the authority of the employer to dismiss or discharge a workman should not be completely taken away where the dismissal or discharge was dependent on the matters unconnected with the dispute pending before any tribunal. At the same time it seems to have been felt that some safeguards should be provided for a workman who may be discharged or dismissed during the pendency of a dispute

1. (1965) 2 S.C.J. 898: (1956) 3 S.C.R. 411. 2. (1962) 3 S.C.R. (Supp.) 618, 623.

on account of some matter unconnected with the dispute Consequently section 33 was redrafted in 1956 and considerably expanded "

By enacting section 33 the Parliament wanted to ensure a fair and satisfactory enquiry of an industrial dispute undisturbed by any action on the part of the employer which could create fresh cause for disharmony between him and his employees The object of section 33 is that during the pendency of an industrial dispute *status quo* should be maintained and no further element of discord should be introduced. But then distinction was made between matters connected with the industrial dispute and those unconnected with it.

While construing the scope of sub-section (3) of section 33 we have to bear in mind the fact that under the common law the employer has a right to punish his employee for misconduct. Therefore all that we have to see is, to what extent that right is taken away by sub-section (3) of section 33 There is no doubt that at the time the application in question was made, an industrial dispute was pending between the respondent and its employees It is admitted that the appellant is a 'protected workman' He had not been discharged or punished before the industrial dispute was decided, though no doubt the respondent had proposed to dismiss him after obtaining the necessary permission from the tribunal The application for permission to dismiss him was made during the pendency of the principal dispute. No such permission would have been necessary if no industrial dispute between the respondent and its employees was pending Hence, the sole reason for that application was the pendency of the industrial dispute Once the industrial dispute was decided, the ban placed on the common law, statutory or contractual rights of the respondent stood removed and it was free to exercise these rights Thereafter there was no need to take anybody's permission to exercise its rights In other words, the limitation placed on the respondent's rights by sub-section (3) of section 33 disappeared the moment the industrial dispute was decided We are in agreement with the tribunal that it had no competence to consider the application made by the respondent after the industrial dispute was decided.

The learned Solicitor General tried to support the conclusion of the tribunal on yet another ground His contention was that the permission sought for could have been granted only by the authority before which the industrial dispute was pending. In the instant case that dispute was pending before the National Tribunal at Bombay. Therefore according to him, the permission asked for could not have been given either by the Labour Court at Delhi or by the Labour Court at Lucknow. The language of sub-section (3) of section 33 *prima facie* lends support to this contention. But in resisting that contention Mr Sen relied on section 33-B which confers power on the Government and under certain conditions on the Tribunal or National Tribunal as the case may be to transfer any proceeding pending before them to Labour Court. The language of this provision is not in harmony with that in sub-sections (1) and (3) of section 33. The learned Solicitor-General urged that to harmoniously construe these provisions we must confine the operation of section 33-B only to cases falling under sub-section (2) of section 33. It is not necessary to decide this controversy in this case in view of our conclusion that the Labour Court at Lucknow was right in its conclusion that it had no competence to grant the permission prayed for as the industrial dispute had come to an end.

For the reasons mentioned above, the appeal is dismissed but there will be no order as to costs. The Special Leave application as well as the Civil Miscellaneous Petition have now become superfluous. They are accordingly dismissed without costs.

V.M.K. *Appeal dismissed.*

[END OF VOLUME (1968) II M. L. J. REPORTS (S.C.)]